

Supreme Court, U.S.  
FILED

05-806 DEC 19 2005

No.

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IN THE  
Supreme Court of the United States

GARY S. WEBBER, PETITIONER

v.

INTERNATIONAL PAPER COMPANY

PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Gary Webber brought the instant claim of disability discrimination when his employer, International Paper Company ("IP"), chose him to be the first of only two people fired in a company reorganization, although there was an open and available position as an SQA coordinator within the IP mill at Bucksport, Maine, to which Mr. Webber could have been reassigned as had almost every other employee whose position was nominally eliminated. In discovery, IP falsely claimed that the SQA coordinator position was filled at the time Mr. Webber was fired, and only at trial was it established that the position had been open. Mr. Webber was qualified for the position, and IP had, only after being faced with a charge of employment discrimination, belatedly offered the position to Mr. Webber.

At the conclusion of discovery, IP moved for summary judgment, principally on the grounds that Mr. Webber was not disabled and that the claimed reason for his discharge (the lack of an engineering degree) could not be found by a rational jury to be pretextual. The Magistrate Judge, in a decision affirmed by the Article III judge, found, at a minimum, that IP regarded Mr. Webber as disabled (Supreme Court Appendix p. 38a, hereinafter A-38a), and that IP's stated reason for Mr. Webber's discharge could be found, by a rational jury, to be pretextual. A-39a-41a.

Only at trial did IP concede that Mr. Webber was a qualified individual with a disability and, thereafter, the focus of the trial was whether the disability or the lack of an engineering degree was the

real reason for the termination. At both the close of plaintiff's case and the close of the evidence, the trial court denied motions for judgment as a matter of law and the jury returned a verdict which, when reduced to reflect the applicable damage caps, reflected an award of compensatory damages of \$300,000.00. A-58a. Post-verdict, for the first time, IP argued that Mr. Webber had never established that any of the retained employees were non-disabled and so had never established a *prima facie* case. The trial court dismissed this argument in a footnote, noting that IP had failed "to include the argument in its initial motion for judgment as a matter of law." A-90a. The trial court then disagreed with the jury's verdict (and its earlier decision affirming the Magistrate Judge's denial of IP's motion for summary judgment) by holding that no rational jury could have found the true reason for Mr. Webber's dismissal was his disability. A-88a.

The First Circuit affirmed, laying great emphasis on the alleged failure to demonstrate that the favored employees who were retained were not disabled. A-5a-9a.

Fundamentally, this emphasis on the sharp dichotomy between disabled/non-disabled is as-ill-chosen as the attempt to delineate the gradations of age in the context of an age discrimination claim. Just as a successful age discrimination litigant need not show that the employee who replaced him was under the age of 40, the successful disability plaintiff need not show that all of the favored employees were free from any disability. To rule otherwise would allow an employer concerned about injury at the work place to refuse to hire blind employees, given their greater perceived

propensity for falling, but to hire deaf employees, who could obviously see where they were walking. Disability is much more akin to age and its many variations and gradations than it is to gender, where the sex of the applicant is known to all and readily ascertainable.

- I. Did Mr. Webber have to show that the employees who were reassigned or retained in the company reorganization were free from any disability, whatsoever, when his claim was that he had a particular disability (a badly injured right knee) which made walking extremely difficult and created a perception that he was injury-prone, or is the imposition of a requirement upon him to show that retained employees fell outside of the protected class one which should be expressly rejected, as it was in the context of age discrimination, in this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996)?
- II. Does the First Circuit's opinion conflict with this Court's opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) because it credits testimony the jury was entitled to disbelieve, weighs conflicting testimony inconsistently with the duty of deference to the jury's verdict, ignores evidence in petitioner's favor pointing to disability discrimination, and accepts the entire view of the case proffered by defendant?



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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, reported at 417 F.3d 229 (1<sup>st</sup> Cir. 2005), is reprinted in the Appendix at A-1a. The District Court's decision denying Defendant's motion for summary judgment, reported at 239 F.Supp.2d 88 (D.Me. 2002), is reprinted in the Appendix at A-22a. The District Court's findings of fact and conclusions of law regarding equitable remedies, reported at 307 F.Supp.2d 119 (D.Me. 2004), is reprinted in the Appendix at A-49a. The District Court's order on Plaintiff's motion to amend and Defendant's motion for judgment as a matter of law or in the alternative for a new trial, reported at 326 F.Supp.2d 160 (D.Me. 2004), is reprinted in the Appendix at A-70a. The First Circuit's unreported decision denying Plaintiff's petition for panel rehearing and rehearing en banc is reprinted in the Appendix at A-91a.

## JURISDICTION

The First Circuit Court of Appeals entered its order affirming the decision of the District Court for the District of Maine on August 9, 2005. On September 20, 2005, the First Circuit denied Plaintiff Gary Webber's petition for rehearing en banc. Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254.

This is a diversity case of disability discrimination brought under the Maine Human Rights Act (MHRA). Although nominally a state law issue, because the MHRA generally tracks federal anti-discrimination statutes, the Maine courts look to federal precedent for guidance in interpreting the MHRA. *Winston v. Maine Technical College System*, 631 A.2d 70, 74 (Me. 1993). "In analyzing

the ADA and MHRA, the Court need not continuously distinguish between the two statutes as to their scope and general intent because Maine courts consistently look to federal law in interpreting state anti-discriminatory statutes." *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37, 45 (D. Me. 1996), *aff'd* 105 F.3d 12 (1st Cir. 1997). As such, the Maine law is interwoven with the federal law and this Court has jurisdiction to review this case. *Michigan v. Long*, 463 U.S. 1032 (1983); *Ohio v. Reiner*, 532 U.S. 17 (2001).

## STATUTORY PROVISIONS

TITLE 5. ADMINISTRATIVE PROCEDURES AND SERVICES  
PART 12. HUMAN RIGHTS  
CHAPTER 337. HUMAN RIGHTS ACT  
SUBCHAPTER III. FAIR EMPLOYMENT  
5 M.R.S.A. § 4572. Unlawful employment discrimination  
1. UNLAWFUL EMPLOYMENT.

It is unlawful employment discrimination, in violation of this Act, except when based on a bona fide occupational qualification:

A. For any employer to fail or refuse to hire or otherwise discriminate against any applicant for employment because of race or color, sex, physical or mental disability, religion, age, ancestry or national origin, because of the applicant's previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions taken by the applicant that are protected under Title 26, chapter 7, subchapter V-B; or, because of those reasons, to discharge an employee or discriminate with respect to hire, tenure, promotion, transfer,

compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment; or, in recruiting of individuals for employment or in hiring them, to utilize any employment agency that the employer knows or has reasonable cause to know discriminates against individuals because of their race or color, sex, physical or mental disability, religion, age, ancestry or national origin, because of their previous assertion of a claim or right under former Title 39 or Title 39-A or because of previous actions that are protected under Title 26, chapter 7, subchapter V-B;

## 2. UNLAWFUL DISCRIMINATION AGAINST QUALIFIED INDIVIDUAL WITH A DISABILITY.

A covered entity may not discriminate against a qualified individual with a disability because of the disability of the individual in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment. A qualified individual with a disability, by reason of that disability, may not be excluded from participation in or be denied the benefits of the services, programs or activities of a public covered entity, or be subjected to discrimination by any such covered entity relating to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment.



**STATEMENT**

Plaintiff/Petitioner, Gary Webber (hereinafter "Petitioner"), through his attorneys and pursuant to Supreme Court Rule 10, hereby petitions for a writ of *certiorari* to the United States Court of Appeals for the First Circuit.

The First Circuit's decision conflicts with two decisions of this Court, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). The First Circuit's decision conflicts with *Reeves* because it credits testimony the jury was entitled to disbelieve, weighs conflicting testimony inconsistently with the duty of weighing testimony in light of a jury verdict in favor of Petitioner, and ignores evidence in Petitioner's favor which points to disability discrimination as the motivating factor for Petitioner's termination. The First Circuit decision also conflicts with *O'Connor* because it holds that a disability discrimination plaintiff must show that favored employees fell outside of the protected class in order to state a *prima facie* case, a notion which was expressly rejected in the context of age discrimination in *O'Connor*.

Gary Webber claimed that International Paper discriminated against him on the basis of his disability when it terminated his employment on June 25, 2001. International Paper's post-discovery motion for summary judgment was denied in a recommended decision of the Magistrate Judge which was affirmed by the District Judge after *de novo* review. A-22a-48a. A jury trial was held in October 2003, during which International Paper twice moved for judgment as a matter of law. Both of those motions were denied, and the jury returned a

verdict in favor of Mr. Webber. However, on June 9, 2004, the District Court entered an order granting International Paper's motion for judgment as a matter of law, A-70a-90a. Mr. Webber appealed to the First Circuit Court of Appeals, which had jurisdiction pursuant to 28 U.S.C. § 1291. On August 9, 2005, a three-judge panel of the First Circuit Court of Appeals affirmed the District Court judgment. A-1a-21a. On September 20, 2005, the First Circuit denied Mr. Webber's motion for rehearing en banc. A-91a.

Gary Webber began working for International Paper and its predecessors (hereinafter collectively referred to as "IP") in November 1983 as a mechanical draftsman and moved up into an engineering position as of 1987.<sup>1</sup> From the first day Gary Webber worked for IP, he heard a motto that "salaried people do not get hurt."<sup>2</sup> Appendix to First Circuit brief, page A-80 (hereinafter referred to as A-\_\_\_).<sup>3</sup>

Mr. Webber injured his knee at the mill in 1997, A-79-80, and had several surgeries on his knee. After over a year of delay, A-96-100, A-198-199, IP installed a stair glide chair for Mr. Webber to traverse part of one flight of two flights of stairs. That chair glide was dubbed the

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<sup>1</sup>Although Mr. Webber does not have an engineering degree, he was fully capable of performing his work and received favorable evaluations throughout his career at IP.

<sup>2</sup>Steve Moser, Plaintiff's third-line supervisor, confirmed that he had heard that phrase at IP before. A-291.

<sup>3</sup>References to the Supreme Court appendix are distinguished by the suffix "a" after the page number.

"George Costanza stairway"<sup>4</sup> by Steve Moser, A-109, and called that by Larry Schaub and Tom Thompson, Mr. Webber's second and first line supervisors. A-110-111. No one else used the chair glide. A-109.

In late January 2001, about two weeks before Gary Webber was scheduled to have right total knee replacement surgery, he and Larry Schaub met with the mill doctor, Dr. Read. Dr. Read told them that Mr. Webber needed to go home before the operation so that he did not get hurt on the mill premises. A-396.

In February 2001, IP instituted a corporate plan for reduction in force dubbed "Functional FAST" with the objective of reducing the number of corporate overhead positions nationwide. Mr. Webber returned to work following his knee replacement surgery in May 2001; however, he was working only four hours a day, four days a week up until his termination on June 25, 2001. A-120-121. During that time period, Mr. Webber's direct supervisor, Tom Thompson, stopped Mr. Webber on the stairway and asked whether he was ever going to get healed up. A-145. Minutes before Mr. Webber was notified of his termination, Tom Thompson pointed his finger at Mr. Webber and said: "You're the weakest link, you're gone." A-122.

Mr. Webber was then notified of his termination in a meeting with the mill manager, Fred Oettinger, and the Human Resources manager, David Libby. Mr. Oettinger

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<sup>4</sup>Mr. Moser admitted that the moniker "George Constanza chair" referred to an episode of *Seinfeld* in which George Costanza faked a disability. A-294.

did not offer an explanation for Mr. Webber's termination, but upon Mr. Webber's inquiry told him that it was because of the "quantity and quality" of his work.<sup>5</sup> A-125-126. The **third** reason offered by Mr. Oettinger to Mr. Webber was that because he did not have an engineering degree he could not do the functions of an engineering position. A-127. Mr. Libby told Mr. Webber that he would never wor' at IP again, and he was immediately escorted off the premises without even being permitted to collect his personal belongings. A-145-148.

Mr. Webber argued that the decision to fire him was motivated by the benign, but illegal, motive of eliminating him as a risk for future injury at the workplace.

## **REASONS FOR GRANTING THE PETITION**

### **I. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *O'CONNOR*.**

The First Circuit focused much of its analysis on Mr. Webber's alleged failure to establish a prima facie case by showing that the retained individuals were not disabled. This analysis ignores a critical Supreme Court decision, *O'Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308 (1996).

IP first argued the absence of a prima facie case

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<sup>5</sup>The fact that he was working only four hours a day, four days a week at the time necessarily reduced the quantity of his work; however, Mr. Webber had hoped to return within a week or two back to a six to eight hour day five days a week. A-126.

post-trial. The District Court dismissed that argument in a footnote, A-90a, since the argument had never been raised in IP's initial motion for judgment as a matter of law. Thus, the issue, for briefing purposes before the First Circuit, was only addressed by Mr. Webber in his reply memorandum.

The argument that Mr. Webber must prove that the retained professional employees were not disabled mixes the standard used in race and sex discrimination cases with the standard for disability cases. One can readily determine the race and sex of favored employees; however, determining the disability status of favored employees is problematic. Since determination of whether one is disabled requires an individualized, case-by-case inquiry, *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 13 (1st Cir. 1999), the approach suggested by IP and approved by the First Circuit would have required a case-by-case battle over the disability status of **all** the salaried employees of the Bucksport mill. Significantly, Mr. Webber did adduce evidence that he was the only employee subject to a reduction in force who needed to use a glide chair. A-109.

The requirement that a disability discrimination plaintiff adduce evidence that retained employees in a company reorganization were not disabled as part of the prima facie case is in direct conflict with *O'Connor*, in which this Court held that an age discrimination plaintiff need not prove, as part of his prima facie case, that he was replaced by an individual outside the protected class (i.e., under age forty). In rejecting that as an element of the prima facie case, the Court stated:

As the very name "prima facie case" suggests,



there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes a legally mandatory, rebuttable presumption. The element of replacement by someone under 40 fails this requirement. The discrimination prohibited by the ADEA is discrimination "because of [an] individual's age," 29 U.S.C. § 623(a)(1), though the prohibition is "limited to individuals who are at least 40 years of age," § 631(a). This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age. . . . Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the McDonnell Douglas prima facie case.

*O'Connor*, 517 U.S. at 311-12 (internal citations omitted). The Court went on to hold that the prima facie case properly requires only "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . ." *Id.* at 312 (citation omitted).

In the wake of *O'Connor*, courts have applied its reasoning to discrimination based on factors other than age, including disability discrimination. In *Leffel v. Valley Financial Services*, 113 F.3d 787 (7<sup>th</sup> Cir. 1997), the Seventh Circuit noted that while evidence of disparate



treatment is one of the most obvious ways to raise an inference of discrimination, it is not the only means of doing so. *Id.* at 794. "All that is necessary is that there be evidence reasonably suggesting that the employer would not have taken adverse action against the plaintiff had she not been disabled and everything else had remained the same." *Id.* (citation omitted). Likewise, in *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018 (8<sup>th</sup> Cir. 1998), the Eighth Circuit rejected the employer's argument that the employee had to prove that other employees were treated more favorably.<sup>6</sup> *Accord Sanchez v. Western Auto of Puerto Rico*, 68 F.Supp.2d 93, 99 (D.P.R. 1999).

Requiring proof that favored employees were non-disabled would allow an employer to fire a person who walked only with a cane as long as it replaced him with a diabetic, or to fire a blind man as long as it replaced him with a deaf man. In each instance, the fired employee would potentially be perceived as a greater risk for injury while walking, while the replacement employee (diabetic or deaf) would be potentially perceived as not being at risk for a trip and fall accident. To require a plaintiff to prove that the retained employee was non-disabled would ignore a discriminatory animus to a particular type of disability.<sup>7</sup> The inferences to be drawn from the evidence

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<sup>6</sup>The Eighth Circuit formulated the prima facie case as requiring a showing that the plaintiff (1) is disabled within the meaning of the ADA; (2) is qualified to perform the essential functions of his job, with or without accommodation; and (3) suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises. *Id.* at 1021-22 (citations omitted).

<sup>7</sup>The Second Circuit has expressly held that discrimination between disabilities, not just discrimination between the disabled and non-disabled, violates the ADA. See *Lewis v. Aetna Life Ins. Co.*, 982

here are that the mill had a discriminatory animus towards salaried employees who were at risk for injury and that Mr. Webber was the only salaried employee of the mill who had a disability which affected his ability to walk and climb. Since any disability is *sui generis*, the proof required for a prima facie case is similarly focused.

## II. THE FIRST CIRCUIT DECISION MISAPPLIES THE STANDARD OF REVIEW MANDATED BY *REEVES*.

The standard for judgment as a matter of law is a stringent one:

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F.Supp. 1158 (E.D. Va. 1997). In that case, the Second Circuit stated:

Under defendants' logic, an employer could hire an employee with a physical disability over a more qualified employee with a mental disability solely because of the mental disability, without violating the ADA, simply because both applicants were members of the protected class. Defendants' interpretation flies in the face of the language of the ADA, which prohibits discrimination against an "individual with a disability because of the disability of such individual." See 42 USC § 12112(a). That is, the ADA prohibits discrimination on the basis of an individual's particular disability. Thus, whether a disabled person is treated differently than a non-disabled person or another disabled person, the same wrong has occurred. That is, the person has been discriminated against because of his particular disability.

*Id.* at 1168. See also *EEOC v. Wal-Mart Stores, Inc.*, 11 F.Supp.2d 1313, 1320 (D.N.M. 1998) (rejecting the notion that an ADA plaintiff must prove, as an element of his prima facie case, that he was replaced by a non-disabled individual or was treated less favorably than a non-disabled individual and noting that "the fact that Wal-Mart may have hired a blind or a deaf person, for example, lacks probative value on the issue of whether [the plaintiff] was discriminated against because of his disability, the missing portion of his arm.").

[I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.

*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000)(internal citations omitted)(emphasis added). The First Circuit inappropriately accepted much of Mr. Oettinger's testimony, resolved conflicts between Mr. Oettinger's testimony and that of other witnesses, and ignored evidence which pointed towards disability discrimination as the motivating factor in the decision to discharge Mr. Webber.

### **Improperly Crediting Oettinger's Testimony**

The First Circuit relied upon the testimony of Mr. Oettinger as to the length of time in which he had to make a decision, the number of people involved in that decision, and the number of positions eliminated. *Webber v. International Paper*, 417 F.3d 229, 233 (1<sup>st</sup> Cir. 2005). Mr.

Oettinger testified to eliminating 11 employees<sup>8</sup>, A-263, to having to make a decision within a week, A-261, and that he made the decision and only then consulted with "the national office." In reality, David Libby conceded under cross-examination that rather than 11 individuals being terminated as Oettinger had claimed, only five people had lost their jobs, and that three of those five had been given either retirement dates a year or more in the future or were still working at the mill in other capacities. A-459-462. Thus, only two employees of the mill were actually let go in June 2001. Mr. Webber was the first person fired and the only person escorted off the mill premises. A-145-148, thus ending his risk for injury at the mill.

As to Oettinger's claim that the decision was made within a week, that testimony was contradicted by Dale Wibberly, who told Mr. Webber that he had seen Mr. Webber's name on a list of potential terminations and had tried to convince "people in Memphis or attorneys" to remove Mr. Webber's name from the list because he was only working part-time as a result of his recent knee surgery.<sup>9</sup> A-397. Oettinger's claim that he had to make a hurried decision was also belied by testimony by Mr. Moser that in April of 2001, with Mr. Oettinger's

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<sup>8</sup>The First Circuit got its facts wrong in claiming that Oettinger testified to an eight-employee reduction. A-3a.

<sup>9</sup>This statement by Mr. Wibberly also belied Mr. Oettinger's testimony that he made the decision and had it rubber-stamped, as the First Circuit suggested, after "consultations with the national office" (417 F.3d at 233), as it clearly reflects that the national office had circulated and suggested Mr. Webber's name to Mr. Oettinger and that the national office was made aware of Mr. Webber's disabled status yet insisted on his firing (one could conclude for that very reason).

approval, he transferred two engineers to different departments to save their jobs in anticipation of Functional FAST. A-280, 294-295, 298.<sup>10</sup>

### **Resolving Conflicting Testimony**

The First Circuit noted the difference between Schaub's and Moser's version of their interactions with Oettinger with Oettinger's version; however, rather than crediting evidence favorable to the jury verdict and discrediting evidence that the jury was not obliged to accept, the First Circuit noted that the "truth is to be found somewhere between these two characterizations." 417 F.3d at 236. Resolving conflicting evidence is not the role of an appellate court. It is not the role of a district court, when a matter is tried to the jury. It is the role of the jury.

### **Omitted Evidence**

Nowhere in the First Circuit decision is any of the following evidence discussed:

Although the First Circuit acknowledged that Mr. Webber's immediate supervisor, Tom Thompson, told him **minutes before** his termination "You're the weakest link, you're gone", the First Circuit totally discounted that

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<sup>10</sup>Moreover, Oettinger testified that when he consulted with Mr. Webber's two immediate supervisors, Mr. Schaub and Mr. Moser, they agreed within five minutes. A-242-243. However, Mr. Moser directly contradicted Oettinger's testimony and stated that he had sought an entire weekend to think over the decision, A-301, and both Mr. Moser and Mr. Schaub agreed that they had the ability to give input and to influence Oettinger's decision. A-301-302, A-328.



remark, stating there was "no evidence that Thompson was involved to any extent whatsoever in Oettinger's decision making." 417 F.3d at 236. There was, however, evidence that Thompson was aware of the decision. The remark speaks for itself, given its timing just before Mr. Webber's termination, and the jury clearly inferred that Thompson knew of the real reason for the termination.<sup>11</sup> IP **never** called Thompson to testify, and the jury could infer that his testimony would have been adverse to IP.

The First Circuit also failed to acknowledge that when Mr. Webber was two weeks away from scheduled knee replacement surgery, he and Mr. Schaub met with the mill doctor, Dr. Read, who ordered him to go home so that he did not get hurt on the mill premises. A-396.<sup>12</sup>

Mr. Oettinger was aware that Gary Webber had a knee injury while at work, and acknowledged his concern that when someone with a bad knee was walking around the workplace they might further injure the knee and create a workers' compensation claim.<sup>13</sup> A-234. The First

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<sup>11</sup>Indeed, the record reflects that Mr. Thompson was "very tight" with Mr. Schaub and that they shared "a lot of information," A-122-123, such that Schaub, who clearly knew of the decision because of his meeting with Oettinger, had probably let the real reason for the decision out of the bag.

<sup>12</sup>This is significant because Mr. Webber did not claim that the decision makers here were motivated by evil intent but that they had a benign, though illegal, desire to avoid any further liability for workplace injuries to Mr. Webber by retaining him as an employee.

<sup>13</sup>As mill manager, Oettinger had been instructed to place great emphasis on having as few work-related injuries as possible and he wanted to have the fewest lost-time injuries of any mill manager. A-235. The mill had recently celebrated having one million safe work



Circuit also ignored the great emphasis that Mr. Oettinger placed upon avoiding workplace injuries. This fear of Mr. Webber getting reinjured led to Mr. Webber being ordered off the mill premises that day and being told he could never work for IP again. A-145-148.

Nor did the First Circuit deal with the shifting reasons for the job action taken against Mr. Webber. Mr. Webber, like every other employee (save one) who was part of the nominal reduction in force of 11 positions, should have been given a different position within the mill or an extended retirement date. The obvious position was the open SQA coordinator position, for which Mr. Webber had actually applied a year earlier. In discovery, Mr. Oettinger claimed that the reason Mr. Webber was not transferred to SQA coordinator was that the position was not vacant at that time. A-244-247. At trial, it was established that the position had remained vacant from April of 2001 through the time of Mr. Webber's termination, A-120, and that the position was not subject to Functional FAST, A-245. This was but one of the many inconsistencies which diminished Mr. Oettinger's credibility. Despite a policy of retaining all engineers on staff even if not in engineering positions, IP offered **no reason** to the jury for its failure to offer the open SQA coordinator position to Mr. Webber in June 2001. A-125, A-245.<sup>14</sup>

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hours without a lost-time accident. A-235.

<sup>14</sup>The First Circuit also suggested that Mr. Webber's contention that he was more qualified than four of the eight retained engineers would have required speculative inference by the jury. 417 F.3d at 239. However, this was not, as the First Circuit suggested, a question of an inference to be drawn from a question by defense counsel, but it was a direct response by Mr. Webber on re-direct to a question by his

The First Circuit stressed accommodations IP gave to Mr. Webber, A-3a, but ignored the long delay in implementing them. A-96-100, A-198-199.

Finally, the First Circuit totally disregarded the failure of more detailed explanations by IP of why an engineering degree was essential to Mr. Webber's retention.<sup>15</sup> IP chose as its star witness Larry Schaub, Mr. Webber's second line supervisor. He claimed that Mr. Webber was incapable of performing structural steel designs, A-344, but conceded on cross-examination that IP had performed a single structural steel project in the two-and-a-half years since Mr. Webber's termination. A-361. Mr. Schaub claimed that Mr. Webber could not do the calculations necessary for a steam system design, A-344-346, but conceded on cross-examination that the mathematics utilized for such a design was algebra, A-361-362, which Mr. Webber had taken (together with physics and trigonometry) before he ever became employed at IP. A-68. Finally, Mr. Schaub claimed that Mr. Webber was incapable of designing HVAC projects (heating, ventilation and air conditioning), A-348, although Mr. Webber established both that he had received specialized training in HVAC through Clemson University and had actually designed and installed several HVAC systems at the Bucksport mill. A-394-395. Thus, when IP tried to explain the importance of an

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own counsel. Mr. Webber testified that he was more qualified than four project engineers who had been retained and had better skills than the only other engineer who was fired. A-203. At no point did any IP witness suggest that the five engineers Mr. Webber had identified as being less qualified than he were in fact more qualified.

<sup>15</sup>Of course, had Mr. Webber been transferred to the SQA coordinator position, this testimony would be superfluous.

engineering degree on a project-by-project basis, the explanations crumbled under cross-examination.

### CONCLUSION

For the foregoing reasons, this Court should grant Mr. Webber's petition for a writ of certiorari because the First Circuit's decision conflicts with the Court's earlier decisions in *Reeves* and *O'Connor*.

December 19, 2005

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1a

(any footnotes trail end of each document)

No. 04-1796

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

GARY S. WEBBER,  
Plaintiff, Appellant,

v.

INTERNATIONAL PAPER COMPANY,  
Defendant, Appellee.

August 9, 2005, Decided

COUNSEL: Arthur J. Greif, with whom Julie D. Farr  
and Gilbert & Greif, P.A. were on brief for appellant.

Jonathan P. Harmon, with whom McGuire Woods LLP  
was on brief for appellee.

JUDGES: Before Lipez, Circuit Judge, Coffin and Cyr,  
Senior Circuit Judges.

OPINION BY: CYR

OPINION:

CYR, Senior Circuit Judge. Gary S. Webber appeals from the district court judgment which was granted to his former employer, International Paper Company ("IP"), as a matter of law notwithstanding the jury verdict which Webber obtained on his state-law

disability discrimination claim. We affirm the district court judgment.

## I

### BACKGROUND

We relate the record evidence, and all reasonable inferences therefrom, in the light most consistent with the jury verdict. See *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 393 (1st Cir. 2002). From 1983 and until his termination in 2001, Webber was a mechanical draftsman for IP at its paper-manufacturing mill in Bucksport, Maine. In 1986, he was promoted to the position of "engineer," a job description which required an engineering degree, which Webber did not possess. In 1989, Webber was assigned to oversee a \$ 1.3 million construction project at the mill site consisting of a chemical storage facility.

In 1997, Webber injured his knee while working temporarily as a forklift operator. Surgery was required. Over the years, Webber had heard other unspecified employees say that "salaried people do not get hurt." During his post-surgery convalescence, Webber's then-immediate supervisor, Stephen Finley, told Webber that his knee might heal faster if he lost twenty pounds. Finley and another supervisor, Lawrence Schaub, laughed at Finley's remark. Webber returned to work one month later. In 1999, he resumed his former duties as a project engineer, despite the fact that his mobility was severely restricted, necessitating his use of a cane.

Webber requested that IP provide him with several

accommodations, including permission to work from his home, reduced work hours, special parking privileges, reassignment from a third- floor to a first-floor office, and the installation of a "glide chair" which would permit Webber to ride from his first-floor office to the third-floor engineering department. IP granted all of these requests. Another supervisor, Steve Moser, dubbed the glide chair "the Costanza chair," a reference to a character from a popular television sitcom who used a glide chair to feign a work disability.

In January 2001, Webber underwent total knee-replacement surgery. One month later, a reduction-in-force plan, called "Functional Fast," was instituted by IP 's national headquarters, which would result in the elimination of 3000 employees nationwide. In May 2001, Thomas Thompson, Webber's immediate supervisor, asked him how long it would be before his knee healed.

In June 2001, Fred Oettinger, the Bucksport mill manager, learned that the overall workforce was to be reduced by 21 positions, which was to include an eight-employee reduction in "technical" (viz., non-manufacturing) staff (viz., from 47 to 39). IP's national office in Memphis informed Oettinger that other IP mills of comparable size employed only six project engineers, whereas Bucksport had ten. Rather than eliminate four project engineers, however, Oettinger decided to cut only two positions.

Following consultations with the national office, Oettinger eventually selected Webber and Wayne Jacobs for termination. Oettinger notified supervisors Schaub and Moser of the decision on Friday, June 22, 2001. Neither Schaub nor Moser voiced objection. On



the following Monday, Thompson approached Webber and informed him: "you're the weakest link, you're gone." Thereafter, Oettinger summoned Webber to a meeting, at which Webber was notified of his termination. Adverting to the "quality and quantity" of Webber's work, Oettinger explained that he had based his termination decision on the fact that Webber was the only one of the ten engineers without an engineering degree, thus was less capable than the other engineers of handling more complex engineering projects.

In August 2001, Webber submitted a disability-based employment discrimination claim against IP with the Maine Human Rights Commission (MHRC), received a right-to-sue letter, and commenced the instant diversity action in federal district court, alleging that IP had violated the Maine Human Rights Act, Me. Rev. Stat. Ann. ch. 5, § 4551 et seq. The district court denied the pretrial motion for summary judgment submitted by IP, as well as its pre-verdict motion for judgment as a matter of law. In due course, a jury returned a \$ 3 million verdict against IP. Thereafter, however, the district court granted IP's renewed motion for judgment as a matter of law and vacated the jury verdict, citing the insufficiency of Webber's evidence as to IP's discriminatory animus. *Webber v. Int'l Paper Co.*, 326 F. Supp. 2d 160 (D. Me. 2004). Webber appeals from the judgment.

## II

### DISCUSSION

#### A. Standard of Review

A district court judgment entered as a matter of law is subject to de novo review, which requires that we view all the evidence, reasonable inferences, and credibility determinations in the light most favorable to the nonmoving party (viz., Webber). See *Vazquez-Valentin v. Santiago-Diaz*, 385 F.3d 23, 29-30 (1<sup>st</sup> Cir. 2004); Fed. R. Civ. P. 50(b). Moreover, we will affirm the ruling only if we determine that the record, thus viewed, strongly and overwhelmingly points to but one conclusion - that no reasonable jury would have reached a contrary result. See *Vazquez-Valentin*, 385 F.3d at 29-30. Although the standard for setting aside a jury verdict is plainly "stringent," plaintiff-appellant Webber - who bears the ultimate burden of proof - must have adduced more than a "mere scintilla of evidence" supporting the elements of his state-law claim, *id.*, and cannot prevail where the verdict necessarily rests upon evidence which is overly speculative or conjectural. See *Ricci v. Alternative Energy Inc.*, 211 F.3d 157, 162 (1<sup>st</sup> Cir. 2000).

#### B. Prima Facie Evidence

As Webber adduced no direct evidence of discriminatory intent, see *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1128 (1<sup>st</sup> Cir. 2000) (describing the stringent requirements of a "mixed-motive" case), his case was subject to the so-called McDonnell-ouglas paradigm. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1<sup>st</sup> Cir. 1999). Accordingly, Webber was required to establish a prima facie case of discrimination, by adducing competent evidence that (1) he was a member of a

protected class (viz., "disabled"); (2) he satisfied his employer's legitimate job performance expectations; (3) his employer terminated him; and (4) his employer did not accord similar treatment to persons outside the protected class. See *Thorndike v. Kmart Corp.*, 35 F. Supp. 2d 30, 33 (D. Me. 1999) (MHRA); accord *Cruz-Ramos v. P.R. Sun Oil Co.*, 202 F.3d 381, 384 (1st Cir. 2000). Once the plaintiff succeeds in establishing a prima facie case, his employer must shoulder the burden to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. See *Reeves*, 530 U.S. at 142. Once the employer satisfies that minimal burden of production, the plaintiff must bear the ultimate burden of adducing sufficient evidence from which a factfinder rationally might infer that the employer's articulated reason is a pretext for discrimination, and that the real reason for the termination was discriminatory animus. See *id.* In this endeavor, "many veins of circumstantial evidence . . . may be mined" . . . [and] these include - but are by no means limited to - evidence of differential treatment, evidence of discriminatory comments, statistical evidence, and comparative evidence." *Rathbun v. Autozone, Inc.*, 361 F.3d 62, 72 (1st Cir. 2004) (citation omitted).

The district court assumed *arguendo* that Webber had satisfied his initial burden to establish a prima facie case, shifting to IP the burden of production, see, e.g., *Hall v. Giant Food, Inc.*, 336 U.S. App. D.C. 63, 175 F.3d 1074, 1079 (1st Cir. 1999), and on appeal, Webber does not contend that he established a prima facie case. Instead, he urges three grounds for determining that the issue is not properly before us.

First, Webber argues that IP waived this argument by failing to include it in its motion for judgment as a matter of law. But, of course, IP is not the appellant, and we may affirm a district court judgment on any ground supported by the record on appeal. See *Geffon v. Micrion Corp.*, 249 F.3d 29, 35 (1st Cir. 2001).

Second, Webber maintains that he was not required to establish that the eight engineers retained by IP were not disabled, because, unlike such obvious attributes as race or gender, disability (or lack thereof) is too difficult of proof. He cites no authority for such an exception to the fourth element; nor have we found any. *Prima facie* proof of coemployees' non-disability may be somewhat more fact-intensive than proof of their race or gender, but the burden is neither unreasonable nor onerous. Webber presumably had ample opportunity to discover this sort of information, and had he proffered even minimally competent testimony that the retained engineers suffered from no such disability, IP would have had the burden to counter Webber's assertions with contrary evidence, if any existed. We can discern no sound reason for excusing a claimant from adducing such straightforward evidence as part of his *prima facie* case.

Finally, Webber argues that the sufficiency *vel non* of his *prima facie* case was relevant only during trial, and that after the jury verdict, the question became entirely moot. See *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983). However, Webber's reliance on *Aikens* is misplaced. During trial, the plaintiff's failure to establish a *prima facie* case will justify summary disposition, since the employer would not be

required to shoulder its burden to articulate a nondiscriminatory reason for the plaintiff's discharge. The McDonnell-Douglas paradigm was designed primarily as a procedural mechanism for use in cases involving no direct evidence of discrimination, in order to facilitate the orderly presentation of circumstantial evidence of discrimination. If the employer fails, however, to move for summary disposition at this procedural juncture - viz., when plaintiff fails to state a prima facie case, and voluntarily assumes its burden of production, the inadequacy of plaintiff's prima facie showing, standing alone, is no longer grist for the summary judgment mill. See, e.g., *Richardson v. Leeds Police Dep't*, 71 F.3d 801, 805 (1st Cir. 1995).<sup>1</sup>

Webber's argument is flawed, however, because he assumes that, after trial, the total absence of evidence which would have comprised his prima facie case is irrelevant to the decision whether plaintiff met his burden of proof at the third stage of McDonnell-Douglas. While the failure or weakness of a prima facie showing will not alone constitute grounds for judgment for the employer, it significantly weighs in the balance when we assess whether the plaintiff adduced sufficient evidence overall from which a jury rationally might infer that the employer's articulated reason constitutes a pretext for discrimination, and that the real reason for the termination was discriminatory animus. See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005) ( "Nonetheless, the evidentiary underpinnings of a plaintiff's case are not irrelevant or insulated from our examination to aid our determination whether the evidence is sufficient to support a finding of intentional discrimination."); see also *Schnabel v. Abramson*, 232 F.3d 83, 89 (2d Cir.



2000).

Webber admittedly failed either to adduce evidence that the eight retained engineers were not disabled, or that IP had terminated any other disabled employee. Indeed, the undisputed evidence discloses that IP and Oettinger had an exemplary record of granting accommodations to Webber and to other disabled employees. Although arguably one might reasonably have expected that IP would come forward with evidence in the event that any of these retained engineers had been disabled, this is beside the point inasmuch as IP did not have to bear that burden of proof. Webber's attempt at a prime facie showing was not merely weak. See *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 47 (1st Cir. 2002) (noting that "strength of plaintiff's prime facie case" must be weighed with "slight" evidence of pretext); *Ricci*, 211 F.3d at 162 (noting that plaintiff's case cannot rest on speculation). As Webber adduced no evidence from which the jury rationally could have determined whether the retained or terminated employees were disabled, he completely failed to carry his burden of proof on the fourth element of his prima facie case, which required that he demonstrate that IP either retained no employees who were disabled, or terminated other employees who were disabled. Given this evidentiary gap, we next turn to Webber's other evidence of discrimination.

### C. The Evidence of Pretext

#### 1. The Circumstantial Evidence of IP's Discriminatory Intent



Webber points to evidence that his supervisors - Schaub, Moser, and Thompson - had a history of making discriminatory remarks concerning his disability. For instance, Schaub laughed when another supervisor told Webber that his knee might heal faster if he lost 20 pounds. Then, after IP installed the glide chair, Moser referred to it as the "Costanza chair" - a reference to an episode in the television sitcom "Seinfeld" wherein a character had used such a chair lift to fake a disability.<sup>2</sup> Immediately prior to the time Oettinger notified Webber of his termination, Thompson gloated: "You're the weakest link, you're gone."

Webber concedes - as he must - an utter absence of evidence (i) that Schaub, Moser, or Thompson affirmatively conveyed any alleged discriminatory animus to Oettinger, who was the decisionmaker of record, see *Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77, 85 (1st Cir. 2004) (discussing lack of "infection"), or (ii) that Oettinger either independently harbored or demonstrated any discriminatory animus toward Webber. Therefore, any alleged animus on the part of Schaub, Moser, or Thompson is relevant only if they participated in or influenced the decision to terminate Webber. See *Rodriguez-Torres v. Caribbean Forms Mfr., Inc.*, 399 F.3d 52, 60 (1st Cir. 2005); *Cariglia*, 363 F.3d at 85; *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 253 n.2 (1st Cir. 2000).<sup>3</sup>

As Webber adduced no evidence that Thompson was involved to any extent whatsoever in Oettinger's decisionmaking, we need not discuss any discriminatory remarks allegedly made by Thompson.

On the other hand, a somewhat closer question is

presented by the conduct of Schaub and Moser. Webber notes (i) that Oettinger consulted with Schaub and Moser three days prior to the termination, and (ii) that Moser decided to mull the issue over during the weekend. IP counters that the purported animus on the part of Schaub and Moser is irrelevant since Oettinger testified (i) that he was the only decisionmaker regarding Webber's termination, (ii) that he simply notified Schaub and Moser of his final decision, and (iii) that neither Schaub nor Moser either participated in or contributed to the decision. The truth is to be found somewhere between these two characterizations, however.

Oettinger, who independently harbored no discriminatory animus, did testify that he had made up his mind to terminate Webber prior to the meeting with Schaub and Moser, and that he consulted Schaub and Moser to reassure himself that he had not overlooked any relevant facts. On the other hand, Moser testified that he thought that he could have changed Oettinger's mind had he expressed disagreement with Oettinger's decision. Thus, Moser's decision to mull over the decision during the weekend could support a reasonable inference that Oettinger expected such input. In the end, of course, Moser simply acquiesced in the Oettinger decision, and there is no evidence that Moser ever told Oettinger that Webber should be terminated. Be that as it may, we shall assume *arguendo* that, even in the absence of any such direct, affirmative communication between Oettinger and Moser, a supervisor's silence (*viz.*, his discriminatory failure to utilize the veto power conferred upon him by his employer) could constitute sufficient "participation" or "influence" to warrant

imputing Moser's purported animus to IP.

The pivotal question thus becomes: whether the jury could rationally infer from these record facts that Moser conceivably "influenced" the decision to fire Webber? We conclude that such an inference is excessively speculative to sustain the jury verdict. The Moser testimony that he "believed" that he could have changed Oettinger's mind regarding the termination not only conflicts with Oettinger's assertion that his decision was final, but even more importantly is unsupported by any other corroborative evidence of Moser's power to veto these decisions, either prior to or following Webber's termination. Furthermore, Oettinger testified that he did not seek Moser's opinion, but instead intended to ascertain whether Moser was aware of any material termination-related facts which Oettinger might have missed. Thus, had Moser intervened, he would have had to supply facts, yet Oettinger nonetheless would have remained the ultimate decisionmaker. Thus, at best the record evidence could support only a most tenuous inference that the Moser decision not to stand up for Webber proximately caused the Webber termination.

## 2. The Nondiscriminatory Basis IP Proffered for the Termination

In explicating its nondiscriminatory basis for selecting Webber for termination, IP pointed to his lack of an engineering degree, and a consequent, relative absence of experience with sophisticated engineering projects while at IP. Webber argues on appeal that the trial evidence generated a jury question as to whether the reason articulated by IP was a pretext for

discrimination, in that (i) his job description had required that he possess such a degree, yet IP let him work at IP as a project engineer for eighteen years without a degree; (ii) IP did not establish that Webber was incapable of handling any type of engineering project which was, or conceivably might be, undertaken at IP; and (iii) Webber adduced evidence that he was better "qualified" than four of the retained engineers with degrees.

A plaintiff may establish pretext by demonstrating, *inter alia*, that the employer articulated a nondiscriminatory reason which had no basis in fact, did not actuate the termination, or was insufficiently weighty to motivate such a decision. See *Hopkins v. Electronic Data Sys. Corp.*, 196 F.3d 655, 662 (6th Cir. 1999); see also *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 56 (1st Cir. 2000) (noting that plaintiff may prove pretext by demonstrating "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons such that a fact finder could infer that the employer did not act for the asserted non-discriminatory reasons "). Webber met none of these criteria.

As a threshold argument, Webber urges that Oettinger gave not one, but two independent [\*238] reasons for the termination: (i) Webber's lack of an engineering degree; and (ii) the quality and quantity of Webber's past work performance. We do not agree.

The record discloses that Oettinger's references to "quality and quantity" were in explanation of, not in addition to, the engineering degree requirement. That is

to say, Oettinger did not use the term "quality" to imply that Webber's job performance had been deficient. Moreover, Oettinger testified that, for that very reason, he had not consulted Webber's job evaluations prior to deciding to terminate him. Instead, Oettinger stated that the lack of an engineering degree limited Webber's capacity to undertake jobs of a particular "quality," viz., more complex engineering jobs, such as those involving the development and maintenance of papermaking machinery. Webber admittedly had never undertaken jobs of that nature or complexity, whereas the eight other engineers who were retained had done so. For instance, Moser testified that Webber would have been incapable of handling 30 out of 50 engineering projects, and that these projects often had \$ 15 million budgets. Webber's most extensive project had involved the construction of a chemical storage facility, and although the project was budgeted at \$ 1.2 million, it did not involve the development and maintenance of papermaking machinery. Finally, Webber's other engineering experience at IP largely consisted of this same type of construction and interior design or restoration project.

Moreover, Webber contests neither the legitimacy nor the necessity of the IP decision to engage in the RIF, nor that Oettinger was compelled to eliminate some engineer positions at the Bucksport plant. See *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1471 (6th Cir. 1990). In addition, pursuant to the "business judgment" rule an employer is free to terminate an employee for any nondiscriminatory reason, even if its business judgment seems objectively unwise. *Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 537 (1st Cir. 1996) ("We may not sit as super personnel departments assessing the



merits - or even the rationality - of employers' nondiscriminatory business decisions."") (citation omitted). By the same token, an employee's opinion of the efficacy of an employment decision, standing alone, cannot supplant the employer's business judgment. *Id.*

Under the business judgment rule, the possession of a degree can be a reasonable criterion for retaining one employee over another. See, e.g., *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1458 (10th Cir. 1994) (college degree); *Barnes*, 896 F.2d at 1471 (chemistry degree). Education, after all, can be a highly significant and concentrated form of experience, and while not an infallible indicium of competence, affords an employer some objective assurance that an employee likely possesses the essential knowledge necessary to perform routine tasks in his field of expertise.

Webber nonetheless contends that he generated a jury issue by showing that IP subsequently contracted away many of its more complex engineering projects to outside engineering companies. Not only does this contention seek to second-guess Oettinger's judgment that he should retain the eight engineers who possessed degrees, but it ignores the fact that - all things being equal - an employer wisely retains those engineers with the latent capacity to perform the most complex tasks, inasmuch as it follows that those engineers could handle all engineering requirements from the simplest to the most complex, whereas an engineer in Webber's position would not be capable of handling the complete spectrum of projects. Although IP may have had the luxury of employing non-degreed engineers like Webber to handle less complex projects prior to its 2001 reduction-in-force, it would be entirely reasonable



and prudent to retain employees on its streamlined staff who could handle the maximum number of projects in the future.<sup>4</sup>

Finally, Webber adduced no competent evidence that four of the eight retained engineers were "less qualified" than he. On cross-examination, defense counsel asked Webber whether four specified engineers were more qualified than he, and Webber responded in the affirmative. Since defense counsel did not specifically ask him for his opinion as to the qualifications of the other four retained engineers, Webber suggests that the jury reasonably could have inferred that they were less qualified. Any such inference would be pure speculation, of course. As the party with the ultimate burden of proof, Webber was required to adduce affirmative evidence as to the alleged inferior qualifications of these four engineers. Even then, of course, IP persuasively may have contended that its "business judgment" as to Webber's and the four engineers' relative qualifications - rather than Webber's judgment - was entitled to considerable deference. See Fennell, 83 F.3d at 537.

The attempt to demonstrate pretext not only fails on its own merits, but is undercut by the undisputed evidence that IP granted Webber's and other disabled employees' requests for handicap accommodations.<sup>5</sup> Like the glide chair installation, many of these accommodations involved significant expense to IP.

### 3. Additional Evidence of Discrimination

Webber tenders two other peripheral circumstances to establish that the articulated reason for IP's adverse

employment action was a pretext. First, Webber had heard among IP employees over the years the expression that "Salaried people do not get hurt." Accordingly, he contends that it is reasonable to infer that this report represented a company policy designed to rid itself of employees who suffered a work-related disability. We do not agree.

Webber failed to establish the original source of this expression, hence it would be speculative to infer that any such rumor was promulgated with either the knowledge or the approval of IP management. See *Santiago v. Canon U.S.A., Inc.*, 138 F.3d 1, 5 n.8 (1st Cir. 1998) ("The identity of the speaker often is crucial to ascertaining not only intent but any causal connection between the remark and the alleged adverse action directed against the plaintiff."); see also *Hein v. All Am. Plywood Co.*, 232 F.3d 482, 488 (6th Cir. 2000) (noting that evidence of employer's discrimination "cannot be based on rumors"). Furthermore, the expression is ambiguous, as it also could be construed as mere recognition of the truism that salaried employees - or those not involved directly in the paper-manufacturing process and with heavy machinery - were generally at less risk for work-related injuries. See *Fernandes*, 199 F.3d at 583 (noting that "a statement that plausibly can be interpreted two different ways - one discriminatory and the other benign - does not directly reflect illegal animus"). The trial record afforded the jury neither a basis nor the context from which to ascertain which interpretation was more plausible.

Webber notes also that IP transferred two engineers from the engineering department to the maintenance

department to prevent their termination under the RIF, yet failed to make a similar accommodation to Webber. In particular, he points out that IP could have transferred him to the open position of supplier quality assurance (SQA) coordinator. Once again, we do not find such evidence sufficiently probative of either pretext or discriminatory animus. The transfer of the two engineers is irrelevant, even if we were to speculate that they were not "disabled," because both possessed engineering degrees, and IP thus had an incentive to retain their services with the company.

By the same token, Webber concedes that an employer undertaking a RIF is not required to offer an employee a transfer to another job position, see *Pages-Cahue v. Iberia Lineas Aereas de Espana*, 82 F.3d 533, 538-39 (1st Cir. 1996) ("Appellants cite no authority for the proposition that an employer conducting a reduction in force must offer such transfers or relocations [to lesser positions] - in fact, authority exists for the proposition that employers face no such obligation."); see also *Jameson v. Arrow Co.*, 75 F.3d 1528, 1532 (11th Cir. 1996) ("We emphasize that the ADEA does not mandate that employers establish an interdepartmental transfer program during the course of a RIF."); *Taylor v. Canteen Corp.*, 69 F.3d 773, 780 (7th Cir. 1995) ("The ADEA does not mandate that employers establish an interdepartmental transfer program during the course of a RIF; an employer incurs no duty to transfer an employee to another position when it reduces its work force for economic reasons."), but contends that *Pages-Cahue* is factually distinguishable because IP had a stated policy of retaining engineers (if possible) because of their value to the company. Webber's contention mischaracterizes the record. Oettinger testified simply

that engineers were valuable to IP, and did not testify to any "policy" regarding the retention of engineers. In any event, the applicability of such policy to Webber would be entirely speculative, in that it is unclear from the context whether Oettinger was referring only to those employees in possession of engineering degrees.<sup>6</sup>

### III

### CONCLUSION

Although unfortunate, the record discloses that Webber failed to meet his burden of proof to show that the proximate cause of his termination was IP's discriminatory animus. Webber failed to offer any evidence either that the employees retained in the RIF were not disabled, or that any other terminated employees were disabled. Moreover, he failed to show that any supervisor who allegedly made discriminatory comments was in a position to participate in or influence Oettinger's decision to terminate Webber. Webber likewise failed to demonstrate that IP's proffered reason for the termination - the fact that Webber was the only one of ten engineers without an engineering degree - was either pretextual or designed to mask its discriminatory intent.

Accordingly, the district court decision dismissing his MHRA claim must be affirmed.

Affirmed.

----- Footnotes -----

n1 This rule would not foreclose either a trial court or an appellate court from dismissing a plaintiff's claim after assuming *arguendo* - as the district court did in the instant case - that the plaintiff made an adequate *prime facie* showing. See, e.g., Hall, 175 F.3d at 1079.

n2 Additionally, we note that Webber failed to establish when these remarks were made. See *Gonzalez v. El Dia, Inc.*, 304 F.3d 63, 69-70 (1st Cir. 2002) (noting that the relevance of a decisionmaker's discriminatory remark wanes as the remark becomes less proximate in time to the employment decision, thus less closely related to it).

n3 Webber contends that *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000), modified *McDonnell-Douglas* so as to allow jury consideration of Schaub and Moser's "stray remarks." To the contrary, *Reeves* involved remarks by the decisionmaker, rather than by management personnel who were in no position either to make or influence the employment decision. *Id.* at 151.

n4 Given this contingency planning rationale, evidence that IP has continued to do these types of less complex engineering projects in house, while contracting out some of its more complex projects, ultimately proves immaterial. Further, Moser testified that, even when it outsourced a complex engineering project, IP nonetheless assigned an in-house engineer to manage and oversee the project.

n5 Barbara Gray, an IP employee who had been diagnosed with cancer and walked with a cane, testified

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that IP had granted her all necessary accommodations to her disability.

n6 Shortly after Webber was terminated, IP offered to rehire him in the SPQ coordinator position at his previous salary, and under new supervisors, but Webber declined IP's offer.



22a

Civil No. 02-63-B-S

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

GARY S. WEBBER,  
Plaintiff

v.

INTERNATIONAL PAPER CO.,  
Defendant

December 20, 2002, Decided

COUNSEL: For GARY S WEBBER, plaintiff:  
ARTHUR J. GREIF, ESQ., JULIE D. FARR,  
ESQ., GILBERT & GREIF, P.A., BANGOR, ME.

For INTERNATIONAL PAPER COMPANY,  
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PORTLAND, ME. VINCENT J. MIRAGLIA, ESQ.,  
MCGUIRE WOODS LLP, WASHINGTON, DC.

JUDGES: Margaret J. Kravchuk, United States  
Magistrate Judge.

OPINIONBY: Margaret J. Kravchuk

OPINION:

RECOMMENDED DECISION ON DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

Plaintiff Gary S. Webber contends that Defendant International Paper Company discriminatorily eliminated his project engineer position in International Paper 's Bucksport mill as part of a nation-wide reduction in force carried out in 2001. Webber filed a complaint in Hancock County Superior Court for disability and age discrimination in employment under the Maine Human Rights Act, 5 M.R.S.A. 4572 §§ & 4621. International Paper timely removed Webber's action to this Court based on the existence of diversity jurisdiction. Now pending is International Paper's Motion for Summary Judgment against both claims. I RECOMMEND that the Court DENY the Motion with respect to Webber's claim of disability discrimination and GRANT the Motion with respect to his claim of age discrimination.

#### Summary Judgment Material Facts

Summary judgment is warranted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 52 (1<sup>st</sup> Cir. 2000). The following facts are drawn from the parties' Local Rule 56 statements of material facts, found in the court's record at docket numbers 12, 15 and 19.<sup>1</sup>

St. Regis Paper hired Plaintiff Gary Webber to work as a mechanical draftsman in its Bucksport mill in 1983. Sometime shortly thereafter, Champion International acquired the Bucksport mill from St. Regis. Although he has never possessed an engineering degree,

Champion promoted Webber to the position of associate engineer in March 1987. In January 1991, Champion again promoted Webber, this time to the position of engineer. Between April 1991 and July 1994, Webber worked in the engineering department as a "project engineer." In July 1994, Champion reassigned him to a position as a finishing/shipping supervisor. Webber eventually returned to the engineering department and to a project engineer position in October 1998, where he remained until discharged by International Paper, which merged with Champion in June 2000. As a project engineer, Webber was in charge of various building and construction projects within the mill, including roofing projects, redesigning the accounting department, purchasing heavy machinery and parking lot maintenance. Docket No. 12, PP1, 2, 3, 4; Docket No. 15, PP1, 2, 3, 4.

In 1997, while working as a finishing/shipper supervisor, Webber fell from a paper roll and injured his knee. In December 1997, sometime after receiving knee surgery, Webber contacted his foreman, Steve Finley, to seek an additional week off due to surgery-related pain. Mr. Finley chided that "if [Webber] lost 20 pounds or more during that week [his] knee would feel a lot better." Finley and Larry Schaub, who was Webber's supervisor at that time and was present in Mr. Finley's office listening by speaker phone, both "burst out laughing." Docket No. 12, PP18, 23; Docket No. 15, PP18, 23.

When he returned to work, Webber received certain accommodations from his employer, including leave time and certain modifications in his working conditions. For example, sometime after Webber

returned to the position of project engineer,<sup>2</sup> Webber was permitted to work from home with a laptop computer for a period of time and some of his duties were "rearranged" to minimize the need to walk and climb stairs while at the mill. Webber was also permitted to have an office in the first floor accounting department rather than the third floor engineering department. Also, in July 2000, International Paper installed a "stairway lift chair" to assist Webber in getting [\*\*5] to the engineering department. Webber's first- and second- line supervisors, Larry Schaub and Steve Moser, referred to the lift as a "Costanza chair," alluding to an episode of the television sitcom, Seinfeld, in which the character George Costanza fakes a disability. Docket No. 12, PP18, 20, 23; Docket No. 15, PP18, 20, 23.

On February 6, 2001, Webber underwent a total knee replacement surgery. Following the surgery, Webber's doctor instructed him to undergo a physical therapy regimen and to remain out of work for approximately three months. Webber returned to work at the end of April or beginning of May 2001 with doctor's orders that he restrict himself to walking or standing no more than 50% of the time, to lifting no more than 25 pounds and to avoid squatting or kneeling. Following a re-evaluation by his doctor on May 24, 2001, Webber was instructed by his doctor to reduce the number of hours he worked to four hours per day, four days per week. Webber requested and received permission to work this reduced schedule. Docket No. 12, P21; Docket No. 15, PP21, 46, 47, 48; Docket No. 19, PP46, 47, 48.

In roughly June 2001, International Paper undertook an initiative dubbed "Functional FAST," which was

designed to, among other things, reduce costs and operational redundancies through a reduction in force. International Paper sought to reduce 3000 positions within various locations and departments, including technology and engineering. In June 2001, International Paper's manufacturing director advised the manager of the Bucksport mill, Fred Oettinger, that he was required to eliminate eight of 47 "technical staff" positions at the mill as part of Functional FAST. To effect this directive, and to determine how best to eliminate the eight positions, Oettinger consulted with certain individuals in International Paper's Memphis and Minnesota offices and with Jeff Hamilton, operations manager of the Bucksport mill, and David Libby, the mill's human resources manager. Working primarily with Hamilton and Libby, Oettinger ultimately eliminated three vacant positions and six occupied positions, including Webber's.<sup>3</sup> Collectively, these three managers considered which staff functions could be reduced with the least effect of the mill's operations, as well as whatever personal knowledge they had of employees' individual capabilities and performances. Oettinger testified at his deposition that he lacked any significant first-hand knowledge of Webber's capabilities and past performance. Libby testified at his deposition that he did not know who Webber was. Docket No. 12, PP5, 6, 7; Docket No. 15, PP5, 6, 7.

With respect to the six, non-vacant positions that were eliminated, one occupant accepted an offer of early retirement, though his position will not expire until February 2003. Two other occupants were let go because of performance problems. The particulars concerning the release of one "nonexempt" employee



are not specified in the record.<sup>4</sup> According to International Paper, "That left two positions in the Technical Department to be identified."<sup>5</sup> Oettinger concluded that two project engineer positions should be eliminated because the mill had eight such positions, more than other, comparable International Paper mills. In deciding which two of its eight project engineers would lose their positions, Oettinger and the other managers considered which two engineers were the least valuable of the eight. According to International Paper, none of the eight had poor performance records, although Oettinger and Libby did not review any of the project engineer's performance evaluations when considering who should lose his position Docket No. 12, PP7, 8, 9, 10; Docket No. 15, PP7, 8, 9, 10.

According to International Paper, "Plaintiff . . . was the first project engineer selected." The second project engineer selected for termination was an individual concerning whom Oettinger had personally received numerous internal complaints. Of the project engineers who remained, two were older than Webber. Docket No. 12, PP12, 13, 14; Docket No. 15, PP12, 13, 14.

After selecting the two project engineers whose positions would eventually be eliminated, Oettinger consulted with these individuals' first- and second-line supervisors to solicit their input. With respect to Webber, Oettinger met with Larry Schaub, the first-line manager, and with Steve Moser, the second-line manager. According to International Paper, both men agreed with Oettinger's decision to eliminate Webber's position. Docket No. 12, P15; Docket No. 15, P15.

International Paper asserts that it terminated



Webber's position because he was the only project engineer without an engineering degree. Although no specific facts are offered in relation to Webber's skill set in relation to any particular "bigger or more complex project," International Paper maintains that Webber "was not qualified to do some projects that the degreed engineers were qualified to perform." However, it does appear that the other project engineers were responsible for major areas, such as specific paper machines, whereas Webber "handled a lot of the extra stuff." On the other hand, when International Paper gave Webber the project engineer position, it did not require that he possess or obtain an engineering degree. Docket No. 12, PP11; Docket No. 15, PP11.

On June 25, 2001, Oettinger and Libby met with Webber to inform him that his position was terminated effective July 15, 2001. Oettinger told Webber that he had been selected because of the lesser quality and quantity of his work. Webber was also informed that he would never work for International Paper again. Some five minutes before this meeting, another of Webber's various supervisors, Tom Thompson, stated to Webber, "You are the weakest link. You are gone." Although he was informed that his termination would not be effective until July 15, 2001, after being notified of his termination on June 25, 2001, International Paper personnel immediately escorted Mr. Webber from the premises. Thus, June 25, 2001 was the last day that Webber ever "physically worked " at International Paper. Until this date, Webber had continued to work at his reduced schedule of four hours per day, four days per week, pursuant to his doctor's orders. Docket No. 12, PP16, 17, 19, 23; Docket No. 15, PP16, 17, 19, 23, 27,

28, 30; Docket No. 19, PP16, 27, 28, 30.

On or about July 8, 2001, Webber applied for long-term disability benefits. International Paper approved the application on July 20, 2001. In either September or October of 2001, Libby offered Webber a position as an "SQA coordinator." Webber refused the position, although he acknowledges that he was fully capable of performing the job functions required by the position. Webber refused the position because it would require him to work with Oettinger and Libby, who he felt had unfairly chosen him for the reduction in force. The SQA position that Libby offered Webber that September was a pre-existing position that was vacant at the time of Webber's termination in June 2001 and had remained vacant during the intervening period. International Paper argues that despite the vacancy in June, the SQA position was not "available" because International Paper had no intention of filling it at that time. Prior to the Functional FAST initiative, efforts were generally made at the Bucksport mill to keep engineers as employees whenever engineering positions were eliminated because their skills typically made them valuable in other departments as well. Docket No. 12, PP17, 22; Docket No. 15, PP17, 22, 32, 42; Docket No. 19, P42.

One of the goals of the Functional FAST initiative was to outsource project design operations and use in-house engineers primarily to perform project management operations. Of all projects undertaken by International Paper since Webber's termination, only one project required skills that Webber did not possess. Mr. Oettinger and Mr. Schaub were both aware of Webber's knee problems and had observed the difficulty Webber

had when walking. Mr. Oettinger was aware that Webber's knee problem had resulted in absences from work and that Webber was working a reduced schedule. International Paper tracks lost-time figures for work-related injuries and Oettinger is concerned lest the Bucksport mill have a higher figure for lost time than other, comparably-sized mills. Docket No. 15, PP36, 37, 38, 41; Docket No. 19, PP36, 37, 38, 41.

In his project engineer position, Webber earned approximately \$ 4800.00 per month and received various benefits, including accidental death and dismemberment insurance and matching 401k contributions. Docket No. 15, P54. By comparison, under long term disability Webber receives \$3,365.83 per month, but neither death and dismemberment insurance nor matching 401k contributions.<sup>6</sup> Docket No. 19, P54.

#### Discussion

International Paper contends that it is entitled to judgment as a matter of law against Webber's claims because Webber was neither terminated nor disabled. International Paper also argues that Webber cannot present sufficient facts to permit the jury to view as a pretext the nondiscriminatory reasons it offers for why it eliminated Webber's position. Defendant's Memorandum of Law in Support of Its Motion for Summary Judgment, hereinafter "Docket No. 11," at 1.

Under the governing summary judgment standard, Webber must establish that a genuine issue of fact exists on each of these issues in order to overcome International Paper's Motion. *Celotex Corp. v. Catrett*,

477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

Pursuant to the Maine Human Rights Act ("MHRA"), it is unlawful employment discrimination for any employer to discharge an employee because of a physical disability or age, among other things, unless the disability-based or age-based reason for the discharge concerns "a bona fide occupational qualification." 5 M.R.S.A. § 4572(1); The MHRA not only prohibits discriminatory discharge, but also discrimination "with respect to hire, tenure, promotion, transfer, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment." *Id.*; see also § 4572(2) (relating to discrimination against a qualified individual with a disability). The Law Court has held that employment discrimination cases brought under the MHRA are to be evaluated at the summary judgment stage according to "the special methodology" developed by the Supreme Court, including the burden shifting framework set out in the Supreme Court's *McDonnell Douglas* opinion. *Maine Human Rights Comm. v. City of Auburn*, 408 A.2d 1253, 1261-62 (Me. 1979) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)). In addition to Supreme Court methodology, the Law Court has also held that other federal precedent should be used "as an aid in interpreting Maine's anti-discrimination provisions." *Bowen v. DHS*, 606 A.2d 1051, 1053 (Me. 1992). See also *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1<sup>st</sup> Cir. 1999) (approving use of *McDonnell Douglas* framework in connection with ADA claims of disability discrimination).

In order for Webber to succeed with his discrimination claims before the jury, he must be able to demonstrate: (1) that he qualifies for membership in a protected class; (2) that he was able to perform the essential functions of the job, either with or without reasonable accommodation; and (3) that International Paper discharged him in whole or in part because of membership in such class (i.e., because of discriminatory animus). *Lebron-Torres v. Whitehall Labs.*, 251 F.3d 236, 239 (1st Cir. 2001). These are the basic elements of a discrimination claim.

In *McDonnell Douglas*, the Supreme Court created a burden shifting methodology whereby a plaintiff lacking direct evidence of discriminatory animus, the third element of a discrimination claim, might yet proceed to trial by proving a "prima facie case" of discrimination and by showing that the non-discriminatory reason the employer asserts for the adverse employment action is pretext for discrimination. Accordingly, the elements of a prima facie case do not include proof of discriminatory animus. *McDonnell Douglas*, 411 U.S. at 802 & n.13. Essentially, the plaintiff need only demonstrate "that [he or] she is a member of a protected group who has been denied an employment opportunity for which [he or] she was otherwise qualified." *Marcano-Rivera v. Pueblo Int'l, Inc.*, 232 F.3d 245, 251 (1st Cir. 2000). In *Cruz-Ramos v. Puerto Rico Sun Oil Co.*, the First Circuit Court of Appeals enumerated the following four elements of a prima facie case in the context of a reduction in force: (1) that the plaintiff was a member of a protected class; (2) that the plaintiff met the employer's legitimate job performance expectations; (3) that the plaintiff experienced adverse employment action; and (4) that



the plaintiff retained non-class members in the same position or otherwise failed to treat the plaintiff's membership in the class neutrally in implementing the reduction in force. 202 F.3d 381, 384 (1st Cir. 2000).

International Paper asserts that the McDonnell Douglas methodology is called for because there is no direct evidence of discrimination. Docket No. 11 at 3. Webber counters that direct evidence of a discriminatory discharge exists in Libby and Moser's jokes concerning the "Costanza chair," Finley and Schaub's laughter concerning Webber's weight, and Thompson's statement to Webber, "You are the weakest link. You are gone." Docket No. 14 at 16-17. Contrary to Webber's argument, none of these statements or events directly demonstrates that his position was eliminated because he was disabled or regarded as disabled. The following discussion therefore follows the McDonnell Douglas framework.

1. Webber succeeds in presenting a prima facie case of discrimination.

International Paper contends that Webber cannot make out a prima facie case of discrimination under McDonnell Douglas. International Paper takes issue only with the first and third aspects of Webber's prima facie case: membership in a protected class and adverse employment action. According to International Paper, Webber cannot show either because he was neither terminated nor disabled. Docket No. 11 at 5, 8. a. Webber suffered an adverse employment action.

International Paper's argument that Webber was not discharged concerns both his age and disability claims.

Notwithstanding International Paper's argument that it still considers Webber an employee because he is on long term disability, Docket No. 11 at 8, the facts clearly support a finding that Webber suffered an adverse employment action when International Paper eliminated his project engineer position, told him he would never work at International Paper again and escorted him from the premises. Webber has not worked at the Bucksport mill since that day. Furthermore, as a consequence of the reduction in force, Webber not only lost his position, but lost his wages and several employee benefits he previously enjoyed, including accidental death or dismemberment insurance, and matching 401k contributions. The fact that these events transpired is not erased by the subsequent job offer, though the offer might bear on back pay damages. See, e.g., *United States EEOC v. Masey Yardley Chrysler Plymouth*, 117 F.3d 1244, 1252 (11th Cir. 1997) (affirming verdict for plaintiff where offer of reinstatement was made and discussing how said offer related to back pay damages).<sup>7</sup> Nor is the subsequent job offer an iron-clad defense to Webber's discrimination claim. It would be permissible for a factfinder to view it as a belated effort to make up for prior, discriminatory conduct, although that is certainly not the only way it might be viewed.

b. Webber is disabled for purposes of the MHRA.

With respect to Webber's membership in a protected class, International Paper challenges only his claim of disability discrimination, not his claim of age discrimination. Although International Paper acknowledges that walking is a major life activity, it argues that Webber is not substantially limited in that

activity because he is still able to drive, go grocery shopping, work in his garden, sweep floors in a gymnasium and walk one-half mile on a treadmill. n8 Docket No. 11 at 6-7. Webber argues that he is disabled for purposes of both Maine and federal anti-discrimination law and also argues that the disability threshold set by the MHRA is lower than that set by the Americans with Disabilities Act. Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, Docket No. 14, at 4-5.

The MHRA defines physical disability in very broad terms:

"Physical . . . disability" means any disability, infirmity, malformation, disfigurement, [or] congenital defect . . . caused by bodily injury, accident, disease, birth defect, environmental conditions or illness, and includes the physical . . . condition of a person that constitutes a substantial disability as determined by a physician . . . , as well as any other health or sensory impairment that requires special education, vocational rehabilitation or related services.

5 M.R.S.A. § 4553(7-A). As Webber argues in his opposition memorandum, this provision, on its face, is more generous than its ADA analogue, which expressly limits physical disability to those impairments that substantially limit a major life activity. 42 U.S.C. § 12102 (2). For example, a "congenital defect " might serve as a disability for purposes of the MHRA even though it had no impact whatsoever on a person's performance of major life activities. Cf. *Rozanski v. A-P-A Transport, Inc.*, 512 A.2d 335, 340 (Me. 1986) (affirming lower court's recognition of asymptomatic

spinal "malformations" as physical defects under the MHRA); *Maine Human Rights Comm'n v. Canadian Pacific Ltd.*, 458 A.2d 1225 (Me. 1983) (same-involving asymptomatic heart murmur); but see *Winston v. Maine Tech. College Sys.*, 631 A.2d 70, 74 (Me. 1993) (citing Me. Human Rights Comm'n, *Employment Reg. § 3.02(C)(1)* and seeking federal guidance in "determining when it is appropriate to impose categorical limits on the definition of a disabled individual"). While it is certain from the record that Webber has an "infirmary" that was caused by bodily injury, it is not so clear whether the physical limitations resulting from his knee replacement have substantially limited one or more major life activities, at least insofar as that standard has been applied by various federal courts.<sup>9</sup>

Ultimately, this legal issue does not need to be resolved. The facts indicate that Webber's supervisors at International Paper regarded Webber as having a physical disability, which is sufficient for purposes of both the MHRA and the ADA. Pursuant to 5 M.R.S.A. § 4553(7-B)(C), an "individual with a physical or mental disability" [includes] a person who . . . is regarded as having a physical or mental disability." See also *id.* § 4572(2) (concerning "unlawful discrimination against qualified individual with a disability").<sup>10</sup> The MHRA definition parallels the ADA definition, found at 42 U.S.C. § 12102(2), and federal cases construing the ADA language and regulations are therefore appropriate guides for construing the MHRA language.

Under the ADA, an individual is regarded as having a physical disability if his employer believes he has an impairment that substantially limits a major life

activity, whether he is actually physically impaired or not. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 489, 144 L. Ed. 2d 450, 119 S. Ct. 2139 (1999). In *Sutton*, the Supreme Court held that severely myopic plaintiffs could not establish that they were regarded by their employer as substantially limited in the major life activity of working<sup>11</sup> simply because the employer considered them unable to work as "global airline pilots." *Id.* at 493 ("Because the position of global airline pilot is a single job, this allegation does not support the claim that respondent regards petitioners as having a substantially limiting impairment."). The same fate has befallen numerous other ADA claimants who lost or were denied particular jobs and pursued ADA claims on the ground that they were regarded as substantially limited in the major life activity of working. See, e.g., *Murphy v. UPS*, 527 U.S. 516, 524, 144 L. Ed. 2d 484, 119 S. Ct. 2133 (1999) ("At most, petitioner has shown that he is regarded as unable to perform the job of mechanic only when that job requires driving a commercial motor vehicle . . . ."); *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1169-70 (1<sup>st</sup> Cir. 2002) (affirming grant of summary judgment in absence of any evidence that employer perceived plaintiff as "unable to work in either a class of jobs or a broad range of jobs in various classes as compared with the average person having comparable training, skills, and abilities"); *Lessard v. Osram Sylvania, Inc.*, 175 F.3d 193, 198 (1<sup>st</sup> Cir. 1999) (affirming grant of summary judgment where employer denied plaintiff one particular job due to plaintiff's physical infirmity); *Tardie v. Rehabilitation Hosp.*, 168 F.3d 538, 542 (1<sup>st</sup> Cir. 1999) (affirming grant of summary judgment where plaintiff offered only that employer considered plaintiff unable to work more than 40 hours per week).



Webber's case is wholly different. First, Webber premises his suit on the major life activity of walking, not working. Second, Webber's summary judgment statement of material facts presents evidence that is directly related to International Paper's perception of him as an employee in need of substantial workplace accommodations due to a readily apparent physical infirmity that impedes his ability to walk. International Paper not only installed a stairway lift chair for Webber, at no small expense, but also significantly reduced his work schedule for an extended period of time and relocated his office from the third floor of the mill to the first floor of the mill. The fact that International Paper extended to Webber accommodations of this sort is sufficient to generate a genuine factual issue on the question of whether International Paper regarded Webber as substantially limited in the major life activity of walking. Cf. *Curry v. Empire Berol, U.S.A.*, 1998 U.S. App. LEXIS 461, [\*100] \*10 (6th Cir. 1998) (unpublished opinion) ("We find nothing in the record to indicate that Empire regarded Curry as having an impairment that substantially limited his ability to work. Empire did nothing to limit Curry's work load or responsibilities although it was well aware of Curry's impairment."). Finally, the fact that International Paper approved Webber's application for long term disability benefits is also probative of whether it regarded him as disabled.<sup>12</sup> Cf., *EEOC v. Town & Country Toyota, Inc.*, 7 Fed. Appx. 226, 230 (4th Cir. 2001) (unpublished opinion) ("An employer's comments referring to a plaintiff as 'disabled' are probative evidence that the employer regarded the plaintiff as disabled."). Because Webber succeeds in showing a prima facie case, a presumption of discrimination arises. *Gillen v. Fallon Ambulance*

Serv., 283 F.3d 11, 30 (1st Cir. 2002). Accordingly, the burden now shifts to International Paper to demonstrate that the elimination of Webber's position was disability-and age-neutral.

2. International Paper has articulated a legitimate reason for eliminating Webber's position.

Once a plaintiff has made out a prima facie case of discrimination, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the adverse employment action. McDonnell Douglas, 411 U.S. at 803. International Paper states that, among other reasons, it "eliminated [Webber's] position because of a desire to increase efficiency." Docket No. 11 at 9. International Paper explains that "other individuals were better able to perform the job duties of a project engineer [because Webber] didn't have the skills to run the major projects like the few people that [sic] were left." This contention is supported by the fact that Webber was the only project engineer lacking an engineering degree and the fact that he tended to work on less complex construction projects. Docket No. 11 at 10 (citing Docket No 12, P11). With this presentation, the presumption of discrimination evaporates and the burden returns to Webber.

3. Webber presents sufficient facts to support a finding that International Paper's explanation for his discharge is pretext for disability discrimination.

Should the defendant present a legitimate, non-discriminatory reason for an adverse employment action, the burden returns to the plaintiff, who must

then show that the defendant's stated reason was, or is, pretext. *McDonnell Douglas*, 411 U.S. at 804. In this endeavor, the Court must "scrutinize the facts, indulging all reasonable inferences in [Webber's] favor, and ask whether the evidence conclusively demonstrates that [International Paper] acted on the basis of an objectively reasonable assessment of the appellant's capabilities and not on the basis of [his age or] impairment." *Gillen*, 283 F.3d at 30.

One of International Paper's justifications for selecting Webber's position, as opposed to another project engineer's position, is that Webber lacked an engineering degree. However, Webber has presented evidence that the lack of an engineering degree never was an issue with respect to his placement in the project engineer position and that all but one of the projects performed by project engineers since his departure were within his general range of competence. Additionally, Webber presented evidence that the more complex project design functions once carried out by project engineers at International Paper have since been outsourced to engineering firms, which also calls into question the reason International Paper offers for Webber's discharge. Furthermore, Webber's performance reviews were all positive; his relative competence and efficiency was never called into question throughout his work history. Yet, despite this positive record, International Paper selected Webber for discharge first, ahead of another project engineer regarding whom Oettinger had received numerous internal complaints. Finally, there is evidence in the record that the chair lift accommodation International Paper provided to Webber was referred to by both Schaub and Moser, Webber's first- and second-line

supervisors, as a "Costanza chair." Although this characterization could be interpreted in different ways by the jury, one legitimate inference would be that this characterization was derisive toward Webber and related to what Schaub and Moser perceived as a physical disability. Although the record indicates that Oettinger was the final decision maker, it also reflects that Oettinger consulted with both Schaub and Moser regarding his selection of Webber for the reduction in force.<sup>13</sup>

4. Webber does not present sufficient facts to support a finding that International Paper's explanation for his discharge is pretext for age discrimination.

Webber's summary judgment statement of additional material facts fails to generate any facts probative of age discrimination and, therefore, summary judgment should enter against his age discrimination claim.

### Conclusion

For the reasons stated herein, I RECOMMEND that the Court grant, in part, and deny, in part, Defendant International Paper's Motion for Summary Judgment, as follows:

DENY the Motion with respect to Count I (disability discrimination); and

GRANT the Motion against Count II (age discrimination).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: December 20, 2002

Margaret J. Kravchuk  
United States Magistrate Judge

#### Footnotes

n1 For counsels' benefit the following docket numbers correspond to the following summary judgment filings:

Docket No. 12--Defendants' [sic] Statement of Material Facts in Support of Motion for Summary Judgment; Docket No. 15--Plaintiff's Response to Defendant's Statement of Undisputed Material Facts and Statement of Additional Material Facts; and Docket No. 19--Defendant's Reply to Plaintiff's Response to Defendant's Statement of Material Facts and to Plaintiff's Statement of Additional Material Facts.

n2 Reading between the lines, this appears to have been after International Paper merged with Champion



in June 2000 and after Webber's knee replacement surgery in February 2001, but the parties do not offer a very clear chronology. Docket No. 12, P21; Docket No. 15, P21. Exhibit A to the Affidavit of Gary S. Webber, found at docket number 16, reveals that Webber was out on short term disability from February 11, 2001 until May 15, 2001, when he held a position as a project engineer. This exhibit also reveals that Webber was out on short term disability from February 24, 1998 until June 15, 1998, when he was working as a finishing/shipping supervisor, which leave must have followed immediately or shortly after the injury to his knee.

n3 All of the eliminated positions were salaried positions. Plaintiff qualifies certain of Defendant's statements by pointing out that only one of these position was "non-exempt" for purposes of overtime. I do not see how this distinction is material to the pending motion.

n4 Docket No. 15, P7 (identifying the "nonexempt" employee named Wood).

n5 International Paper's use of the language, "That left . . ." suggests that the statement found in Docket No. 12, P9 logically follows from the preceding statement. Although it is evident from the parties' statements that the technical department is one component of a larger engineering workforce, there is no explanation offered by either party concerning how the technical department is distinct from other engineering departments or why the technical department was chosen to lose two project engineer positions rather than eliminating one or two project engineer positions from another engineering department.

n6 Although the Court need not reach the question of whether Webber was disabled for purposes of the MHRA, Webber offers the following facts on the issue:

43. Since Gary Webber's knee replacement surgery in February 2001, his doctor has imposed permanent restrictions on his activities. As a result, he is unable to perform many activities which he used to do in the past, and [has] been required to modify other activities so that he can perform them. The following are some examples of activities which he has ceased or modified:

- a. He is no longer able to do any kayaking or boating/fishing, since he is unable to climb into or out of a boat.
- b. He is no longer able to play basketball with his children.
- c. He can no longer play golf.
- d. Although he is still able to do light gardening, he has had to modify his gardening activities. For instance, he uses a milk crate to sit on so he can reach the ground without excessive bending or squatting.
- e. He can no longer do yard work such as cutting up and removing fallen tree branches. He is unable to do the bending and lifting involved in those tasks, and has difficulty with balance on uneven ground. He is also unable to use a chain saw because of the narcotic medication that he is required to take on a regular basis for pain.

f. He used to enjoy doing carpentry and woodworking, but can no longer do those activities. He is unable to use power tools because of his medication.

g. He is unable to do any work on his house that requires the use of a ladder. He recently had to hire someone to paint the trim on his house exterior, which in the past before his knee injury he would have done himself.

h. He can no longer do animal care such as bathing his dog.

i. He is limited in the amount of time that he can drive a vehicle, which restricts his ability to travel distances. He has had to modify the way in which he drives such that he now uses his left foot on the brake and his right foot on the gas. It is very difficult for him to get in and out of vehicles, and he has had to sell two vehicles which he owned that were particularly difficult to get into and out of. He can no longer drive any vehicle with a standard transmission.

j. He had planned some home renovation projects which he has now put on hold as a result of his knee injury. In particular, he had planned to renovate his basement, but is unable to make the frequent trips up and down the stairs that would be necessary for that project. He also cannot move furniture or carry anything heavy.

k. Because he lives in a 2-story house with my [sic] bedroom on the second floor, he has had to modify the way in which he does laundry. He is not able to carry a laundry basket down the stairs, and now has to throw all laundry to the bottom of the stairs. Once the laundry

is finished, he has to leave it stacked downstairs and have others carry it upstairs.

l. He is unable to vacuum or wash/wax the floors in his house because of the bending and twisting involved in those activities. He used to do floor washing and waxing on his hands and knees, which he can no longer do.

m. He is able to do grocery shopping, but has to limit the amount of groceries that he buys because he is unable to carry heavy bags of groceries. He has needed to use the power riding shopping cart on several occasions, and he uses a grocery cart to lean on as a walker and to transport the bags of groceries to his car. His family has to carry the groceries in from the car to the house.

n. When preparing meals, he has to do as much preparatory work as possible from a sitting position. He is unable to cook meals that require him to stand at the stove for a long time.

o. He is taking a class at the University of Maine at Orono, and has had difficulty with that class because the university is a large campus and it is difficult for him to walk very far. He has particular difficulty walking on uneven ground, for which he is required to use a cane. His class involves field trips to various areas of the campus, and he has been required to drive to some and miss others if there is no nearby parking.

p. Prior to his knee injury, he had done a significant amount of volunteer activity. He continues to do some volunteer work, but it is very limited in the types of

things he can do and the amount of time which he can volunteer, because of pain and swelling in his leg.

q. He has a handicapped parking permit and uses it every day.<sup>44</sup> In addition to the modifications that Gary Webber has made to his activities, he is limited in the amount of time that he can perform these activities. After two to three hours of light activity, his knee and calf become extremely swollen and painful and he is required to sit or lie down and elevate his leg for about an hour.

45. Gary Webber's knee replacement surgery and the resulting limitations on his activities have also affected his relationship with his family. He is married and has two teenage daughters. His wife and daughters are now required to do a lot of tasks for him or to assist him with certain tasks. He is unable to do many activities with his family that he used to do, such as walking, playing basketball, golfing, hiking and kayaking. The constant pain that he has been in since his knee replacement surgery has also affected his disposition and has caused a great deal of strain on his relationship with his wife and his children.

Docket No. 15, PP43-45.

n7 An employer "having once offered reinstatement, is released from the back pay obligation from the date the offer was rejected." *NLRB v. Huntington Hosp., Inc.*, 550 F.2d 921, 924 (4th Cir. 1977).

n8 Of course, only the last two of these activities necessarily involve walking.



n9 Such as those cited by International Paper. Docket No. 11 at 6-7.

n10 Subsection 4572(2) addresses unlawful discrimination in varying contexts, including discrimination in employment, whereas subsection 4572(1) addresses only employment discrimination.

n11 The Court assumed, without deciding, that working is a major life activity, noting "that there may be some conceptual difficulty in defining 'major life activities' to include work," because the operative issue in a disability suit is whether one has been denied work due to a disability. Sutton, 527 U.S. at 492.

n12 International Paper does not address in its principal memorandum whether Webber was regarded as disabled. Nor does International Paper make any effort in its reply memorandum to refute Webber's assertion that he was regarded as disabled.

n13 I do not consider the 1997, weight-related wisecrack that Finley and Schaub shared at Webber's expense to reflect discriminatory attitudes toward either age or disability. Nor do I consider the "weakest link" comment by Thompson to be especially probative because there is nothing in the record linking Thompson to International Paper's decision-making process.

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CIVIL NO: 02-63-B-S

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MAINE

GARY S. WEBBER,  
PLAINTIFF

v.

INTERNATIONAL PAPER COMPANY,  
DEFENDANT

February 26, 2004, Decided

COUNSEL: For GARY S WEBBER: ARTHUR J.  
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For INTERNATIONAL PAPER COMPANY:  
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JUDGES: George Z. Singal, Chief U.S. District Judge.

OPINIONBY: George Z. Singal

OPINION:

FINDINGS OF FACT AND CONCLUSIONS OF  
LAW

SINGAL, Chief District Judge.

Plaintiff Gary Webber sued International Paper Company ("IP") under the Maine Human Rights Act, 5 M.R.S.A. § 4551 et seq. ("MHRA"), alleging that his dismissal as part of a company-wide reduction in force was motivated by his disability. The action was removed to federal court based on diversity jurisdiction. At trial, the jury found for Mr. Webber, and awarded compensatory and punitive damages. Claims for front and back pay are now before the Court. Pursuant to Federal Rule of Civil Procedure 52(a), the Court makes the following Findings of Fact and Conclusions of Law with regard to Mr. Webber's claims for front and back pay.

I. FINDINGS OF FACT

Background. Gary Webber was born January 25, 1953; he is 51 years old as of the date of this opinion. Mr. Webber was employed at the Bucksport mill beginning in November of 1983. International Paper acquired the Bucksport mill in 2000. During his tenure at the mill, Mr. Webber worked in various positions; in the summer of 2001, Mr. Webber was employed as a project engineer. Mr. Webber testified that if he had not been

terminated, he intended to work at the Bucksport mill until he reached the age of 65.

As of July 15, 2001, the date of his termination, Mr. Webber's annual salary was \$ 59,143; he also received non-salary benefits including medical insurance, dental insurance, life insurance, and long-term disability insurance.<sup>1</sup>

History of Disability. Mr. Webber has a history of problems with his knees, which impair his mobility and have required him to undergo several surgeries. While he was employed at the Bucksport mill, his knee surgeries and recuperation from surgery sometimes rendered him unable to report for work. During these periods, International Paper (or its predecessors) continued pay Mr. Webber his full salary, pursuant to the "salary continuance" short-term disability plan. (Evid. Hr'g Tr. at 26, Evid. Hr'g Def.'s Ex. DD.)

As of the evidentiary hearing on November 24, 2003, Mr. Webber was scheduled to undergo another knee surgery in January 2004, which he anticipated would require a three- to four-month recuperation period following the surgery, during which time he would not be able to report for work.

Termination and Offer of Reinstatement. On June 25, 2001, Mr. Webber was informed that his position was being eliminated as of July 15, 2001 as part of a company-wide reduction in force. His last regular salary payment occurred on July 15, 2001.

Shortly after being notified of his impending termination, Mr. Webber retained a lawyer. A

complaint was filed with the Maine Human Rights Commission on August 10, 2001. David Libby, the Human Resources Manager at the Bucksport mill, telephoned Mr. Webber on September 25, 2001 to offer him the opportunity to return to work at the Bucksport mill in the position of "SQA Coordinator." The pay and benefits would have been the same as at his previous position as a Project Engineer, and the work was largely sedentary. Mr. Webber turned down the offer. Mr. Libby telephoned Mr. Webber at least once thereafter to re-extend the offer to him. Although Mr. Webber's immediate supervisors would have been different from his immediate supervisors as a project engineer, correspondence from Mr. Webber's attorney to IP indicated that Mr. Webber did not wish to return to a position that would be "subject to the overall control of the Mill Manager and the Human Resources Manager, who were the two individuals who terminated Mr. Webber." (Trial Ex. D-20.) At trial, Mr. Webber explained that he turned down the position because:

I was loyal to them all those years [and had filed a complaint with the Maine Human Rights Commission after my termination] and all of a sudden, a job that was opened up when they fired me is now available to me. I didn't feel that I could trust them. I figured I'd be there a short amount of time, and I'd be terminated again.

(Trial Tr. at 133-34.) On cross-examination, Mr. Webber acknowledged that his concern that he would be re-hired only to be terminated again was not based in fact and was purely speculative.

**Long-Term Disability Coverage.** In 2001, IP provided its employees with mandatory long-term disability



insurance that would pay benefits equal to 60% of the worker's salary in the event of a qualified disability. The annual premiums paid by IP with respect to Mr. Webber's long-term disability insurance coverage totaled \$ 507 in 2001. In 2001, Mr. Webber contributed an additional \$ 126 annually to increase his long-term disability coverage so that in the event of disability, he would receive benefits equal to 70% of his salary.

International Paper's long-term disability insurance plan was self-insured: premiums paid by the company, together with any supplemental premiums paid by employees were deposited in an account from which disability benefits were paid by the third-party administrator, Wausau Benefits, Inc.

**Long-Term Disability Benefits.** On July 8, 2001, after he had been informed of his impending termination but before his regular salary had been discontinued, Mr. Webber applied for long-term disability benefits. On July 20, 2001, Mr. Webber was informed that his application for long-term disability benefits had been approved. Mr. Webber received long-term disability benefits from August of 2001 to October of 2003.

The long-term disability benefit was paid in monthly payments of \$ 3,365.83. During the time that Mr. Webber received long-term disability benefits, he also continued to receive the medical benefits he had received during his regular employment at the mill. The dental benefits he and his family had received when he was an employee were discontinued. Under the provisions of the policy, if Mr. Webber obtained employment while receiving long-term disability benefits, his long-term disability benefits would be

negatively affected.

**Job Search.** Mr. Webber described his job search following his dismissal from the Bucksport mill as follows:

I have applied for a position at Jackson Lab, which was very similar to the position I held at the mill, Home Depot, the IGA in Trenton. I found a technical position job search called PJ Scout on the Internet, and I checked that. They send me updates for technical positions in the area. Most have been in New Jersey [and] New York, so they haven't qualified. I check the Bangor Daily News daily, especially on the weekends. I've checked the local papers -- Ellsworth American, Bar Harbor Times. And there's one in -- based out of Bangor, downtownme.com (Evid. Hr'g Tr. at 20-21.)

Mr. Webber focused his job search on technical positions generally because he did not have an engineering degree. Mr. Webber did not go to the unemployment office to check job listings. At the evidentiary hearing, Mr. Webber testified that he had completed a total of six applications for work from the date of his discharge to the date of the hearing, but could only remember three of them. He testified that these six positions were the only positions available that he "thought [he] could do with [his] restrictions." (Evid. Hr'g Tr. at 46.) The first application was for a job as facilities manager at the Jackson Laboratory, a position that required an engineering degree. Mr. Webber recognized that he was not qualified, but knew that the position had been open for two years, and thought [\*\*8] perhaps he could be competitive without a degree. He also applied for employment at a local

grocery store and at The Home Depot, despite the fact that there were no open positions with either employer at the time of his applications. Mr. Webber testified that he was unable to find a job that he believed he could perform with his limited mobility.

Mr. Webber testified that he applied for employment at the Jackson Laboratory and The Home Depot in the autumn of 2001, and could not remember whether he applied for employment at the grocery store in 2001 or in the spring of 2002.

Recertification/retraining. Although Mr. Webber had worked as an industrial arts teacher for almost eight years prior to his employment at the Bucksport mill, he did not seek employment in that field following his termination. Mr. Webber testified that he did not have a teaching certificate, and that he did not seek to obtain a teaching certificate after his termination. He indicated that he was "not too sure [he] wanted to go back into teaching." (Evid. Hr'g Tr. at 48.) In order to obtain certification, Mr. Webber testified that he would need to complete between four and six classes at the University of Maine at Orono, and that it was difficult for him to drive from his home to the university to attend classes. Mr. Webber testified that he met with a counselor "about retraining or trying to find some other occupation that might be within my restrictions." (Evid. Hr'g Tr. at 47.) Apparently as a result of his consultation with the counselor, Mr. Webber took one course in horticulture or landscape design.

Volunteer work. Mr. Webber testified that he has served on the school board of the local school union for twelve years. In addition, following his termination

from his position at the Bucksport mill, Mr. Webber developed a database to keep track of the chemicals used in the school building, a database similar to that used at the mill.

Evidence of job opportunities/failure to mitigate. At the hearing, IP asked Mr. Webber whether he knew of several employers in Mr. Webber's geographic area: St. Joseph's Hospital, University of Maine, Eastern Maine Medical Center, the Ellsworth hospital, and Husson College. IP did not establish that those employers had open positions or that Mr. Webber would have been eligible for any such positions, nor did it introduce any evidence as to the compensation that Mr. Webber could have earned had he pursued such positions with reasonable diligence.

Current job availability at the Bucksport mill. A subsequent reduction in force occurred at the Bucksport mill in the Fall of 2003, and two additional project engineer positions were eliminated. Each of the positions eliminated was occupied by an individual with a four-year engineering degree. Both of the project engineers whose positions were terminated are scheduled to continue working at the mill until September of 2004. The SQA Coordinator position was not eliminated in the Fall 2003 reduction in force.

Although there are no open positions in the engineering department where Mr. Webber worked at the time of his termination, IP has stated that it prefers reinstatement to front pay and that it is willing create a position for Mr. Webber, should the Court determine that front pay or reinstatement is appropriate. Mr. Webber has indicated that he would consider accepting

a position at IP, but noted that he will be unable to work for three to four months following his January 2004 knee surgery.

**Jury Verdict.** On October 10, 2003, the jury rendered a verdict in favor of Mr. Webber, and awarded compensatory damages of \$ 1,000,000 and punitive damages of \$ 2,000,000. The jury was also asked the following question: "Has International Paper proven by a preponderance of the evidence that Gary Webber should have accepted the offer of employment as SQA Coordinator on or after September 25, 2001?" The jury answered in the negative.

## II. CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Court makes the following conclusions of law:

1. The long-term disability benefits received by Mr. Webber constitute a collateral source and may not be deducted from an award of back pay under the MHRA.
2. The Court is bound by the jury's determination that IP did not prove by a preponderance of the evidence that Mr. Webber should have accepted the offer of employment as SQA Coordinator on or after September 25, 2001.
3. Mr. Webber removed himself from the labor market at the end of 2001 by failing to apply for any jobs after that time, and is not entitled to an award of back pay for subsequent periods of unemployment.
4. Mr. Webber is awarded back pay for the period



between July 15, 2001 and December 31, 2001 in the amount of \$ 27,384.02.

5. Reinstatement is not feasible in this case: Mr. Webber's position has been eliminated, there are no open positions at the mill, and the possibility of creating a position for Mr. Webber could potentially require significant judicial oversight.

6. Mr. Webber has been more than adequately compensated for his injury, and no front pay is awarded.

7. Maine statute imposes a cap on the sum of compensatory and punitive damages. The jury's awards of compensatory and punitive damages are reduced to \$ 300,000 and \$ 0, respectively.

8. Mr. Webber is not entitled to prejudgment interest on the jury award, but is awarded prejudgment interest of 8% on the award of back pay.

### III. DISCUSSION

#### A. Back Pay

As concerns the issue of back pay to which Mr. Webber is entitled, the parties have presented two main issues. First, should an award of back pay be reduced by the amount of long-term disability benefits received by Mr. Webber and attributable to premiums paid by IP? Second, did Mr. Webber adequately mitigate his damages: (a) when he refused an offer of reinstatement at the Bucksport mill, and (b) in his search for alternate employment?

## 1. Collateral Source Rule

IP argues that because it self-insures its long-term disability benefits plan, IP itself paid Mr. Webber's long-term disability benefits; therefore, they do not proceed from a collateral source. IP concludes that any award of back pay should be reduced by the amount of long-term disability benefits received by Mr. Webber and attributable to the premiums paid by IP. Predictably, Mr. Webber contends that the long-term disability benefits are a collateral source and that there should be no set-off against an award of back pay.

Under the collateral source rule, "a plaintiff who has been compensated in whole or in part for his damages by a source independent of the tortfeasor is nevertheless entitled to a full recovery against the tortfeasor."<sup>2</sup> *Potvin v. Seven Elms, Inc.*, 628 A.2d 115, 116 (Me. 1993). "The premise underlying this rule is that either the injured party or the tortfeasor will receive a windfall if part of a loss is paid by an independent source, and as between the injured party and the tortfeasor, the injured party should reap the benefit of the windfall." *Id.* Under the Maine Human Rights Act, there is no judicial discretion to reduce a back pay award by amounts received from a collateral source. See *Me. Human Rights Comm'n v. Dept. of Corr.*, 474 A.2d 860, 870 (Me. 1984); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 16-17 (1st Cir. 1999).

Whether or not a benefit provided to employees by an employer is considered a collateral source depends on whether it is a "fringe benefit" or whether it is provided as a means of indemnifying the employer for injuries suffered by its employees. See *Allen v. Exxon*

Shipping Co., 639 F. Supp. 1545, 1547-48 (D. Me. 1986). Allen and its progeny set forth a five-factor inquiry on this question:

(1) whether the employee makes any contribution to funding of the disability payment; (2) whether the benefit plan arises as the result of a collective bargaining activity; (3) whether the plan and payments thereunder cover both work-related and nonwork-related injuries; (4) whether payments from the plan are contingent upon length of service of the employee; and (5) whether the plan contains any specific language contemplating a set-off of benefits received under the plan against a judgment recovered in a tort action.

Allen, 639 F. Supp. at 1548. See also *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1244-45 (5th Cir. 1994); *Phillips v. W. Co. of N. Am.*, 953 F.2d 923, 932-33 (5th Cir. 1992); *Reed v. E.I. Du Pont de Nemours & Co.*, 109 F. Supp. 2d 459, 467-68 (S.D.W.Va. 2000); [<sup>\*\*16</sup>] *Ruberto v. Maritrans Operating Partners, L.P.*, 1993 U.S. Dist. LEXIS 11612, 1993 WL 316754 at \*1 (E.D. Pa. 1993 Aug. 23, 1993).

In this case, IP seeks only to set off those portions of the long-term disability benefits attributable to the premiums paid by it, and not the additional premiums paid by Mr. Webber. Nevertheless, the fact that Mr. Webber had the option of contributing additional premiums for additional coverage weighs in favor of finding that the benefit was a collateral source. There is no evidence in the record as to whether the benefit plan arose as the result of collective bargaining activity; this factor does not weigh in favor of either the plaintiff or the defendant. The long-term disability plan covers both work-related and non-work-related injuries,

indicating that the plan is a fringe benefit and not an indemnification plan. Payments from the plan are not contingent upon the length of service of the employee; this weighs against a determination that the plan is a fringe benefit. The long-term disability plan does not contain specific language contemplating a set-off of benefits received against a judgment rendered in favor of the employee against the employer; this also weighs in favor of a finding that the long-term disability plan was a fringe benefit.

Having considered the factors above, the Court concludes that indemnification of the employer for liability was not a dominant purpose of the plan, and that the long-term disability policy in question is properly considered a fringe benefit. The long-term disability benefits paid to Mr. Webber therefore constitute a collateral source which may not be offset against an award of back pay under the Maine Human Rights Act.<sup>3</sup>

## 2. Mitigation of Damages

The Maine Supreme Judicial Court has held that back pay awards are meant to "make the employee whole and not to penalize the employer unless that penalty is authorized by statute." *Kopenga v. Davric Maine Corp.*, 1999 ME 65, 727 A.2d 906, 909 (Me. 1999) (internal quotation marks omitted) (quoting *Rozanski v. A-P-A Transp.*, 512 A.2d 335, 342 (Me. 1986)). A court's back pay award will be upheld absent clear error or abuse of discretion in the amount awarded. *Kopenga*, 727 A.2d at 908-09. The Court may award back pay in an amount supported by competent evidence in the record. *Id.* at 909.

Back pay must be reduced by the amount that the plaintiff actually earned or "could be expected to earn with reasonable diligence in other employment." *Rozanski v. A-P-A Transp., Inc.*, 512 A.2d at 343. The burden is on the defendant to prove facts relating to the appropriate deductions from back pay. *Me. Human Rights Comm'n v. Dept. of Corr.*, 474 A.2d at 869. To show that the plaintiff was not sufficiently diligent in pursuing other employment, the defendant must do more than show that plaintiff could have taken further actions in pursuit of employment: "the range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct." *Me. Human Rights Comm'n v. Dept. of Corr.*, 474 A.2d at 869.

a. Offer of Reinstatement as SQA Coordinator  
It is without dispute that IP unconditionally offered Mr. Webber a position as SQA Coordinator at the mill on September 25, 2001 and again in early October 2001. The pay and benefits would have been identical to those he received as a project engineer, and he would not have had to work under the same supervisors he had worked for as a project engineer. Mr. Webber testified that he got along well with the people who would have been his supervisors had he accepted the SQA Coordinator position. Mr. Webber rejected the offer of re-employment twice because he thought he would be re-hired only to be fired again and because his feelings were hurt.

In *Ford Motor Co. v. EEOC*, 458 U.S. 219, 73 L. Ed. 2d 721, 102 S. Ct. 3057 (1982), a sex discrimination case under Title VII, the United States Supreme Court held that "absent special circumstances . . . the ongoing



accrual of backpay liability is tolled when a Title VII claimant rejects the job he originally sought." *Id.* at 238-39. This holding is applied by extension to actions under the Maine Human Rights Act. See *Doyle v. Dep't Human Servs.*, 2003 ME 61, 824 A.2d 48, 57 n.7 (Me. 2003) ("Because the MHRA generally tracks federal anti-discrimination statutes, it is appropriate to look to federal precedent for guidance in interpreting the MHRA.") (citing *Winston v. Me. Technical Coll. Sys.*, 631 A.2d 70, 74-75 (Me. 1993)). The question of whether "special circumstances" justify rejection of an offer of reinstatement is essentially a reasonableness test. See *Wilcox v. Stratton Lumber, Inc.*, 921 F. Supp. 837, 843 (D. Me. 1996) (citing *Smith v. World Ins. Co.*, 38 F.3d 1456, 1464 (8th Cir. 1994)).<sup>4</sup>

With the consent of International Paper,<sup>5</sup> the jury was asked whether International Paper had proven by a preponderance of the evidence that Mr. Webber "should have accepted the offer of employment as SQA Coordinator on or after September 25, 2001." IP did not request jury instructions on the legal significance of an offer of reinstatement and did not object to the mitigation of damages instruction given to the jury.

In determining appropriate equitable relief, this Court is bound to follow the facts as found by the jury. See *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d at 19. In light of the jury's finding on the above question, the Court cannot cut off equitable relief for unreasonable refusal to accept an offer of reinstatement in light of the jury's verdict in this case. Even if the Court is not bound by the jury's verdict, the Court declines to cut off equitable relief based on the offer of reinstatement and its refusal.

b. Inadequate job search.

International Paper argues that Mr. Webber is not entitled to back pay damages because he did not seek alternate employment with reasonable diligence. An award of back pay should be reduced by "whatever amount [the plaintiff] could with reasonable diligence have earned" between the date of the unlawful discrimination and the judgment. *Me. Human Rights Comm'n v. City of Auburn*, 425 A.2d 990, 999 (Me. 1981). The defendant "bears the burden of proving the facts to enable the court to determine the appropriate deduction." *Id.* However, where the defendant shows that "the former employee made no effort to secure suitable employment," the defendant-employer is relieved of the "burden [of proving] the availability of substantially equivalent jobs in the relevant geographic area." *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d at 16.

The evidence adduced at the evidentiary hearing indicated that Mr. Webber applied for six jobs, only three of which he could remember. The dates of application that Mr. Webber could recall were in the autumn of 2001. Because there is no evidence that Mr. Webber sought any jobs after 2001, the Court concludes that Mr. Webber removed himself from the labor market at the end of 2001, relieving International Paper of the burden of proving the availability of substantially equivalent jobs in the relevant geographic area beginning January 1, 2002.

As for the last half of 2001, although Mr. Webber's job search does not present a paragon of diligence, it is not disputed that he did make a minimal effort to obtain alternate employment. Therefore, the burden of

proving failure to mitigate remains with International Paper. See *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d at 16 ("As long as the claimant has made some effort to secure other employment, the burden to prove failure to mitigate normally resides with the defendant-employer.") Assuming *arguendo* that Mr. Webber's job search in 2001 did not constitute the exercise of reasonable diligence, IP has not established any facts to permit the Court to calculate what Mr. Webber might have earned with reasonable diligence. Therefore, any reduction in back pay for that period would be based on speculation and the Court need not reach the question of whether Mr. Webber exercised reasonable diligence in seeking alternate employment.

The Court therefore awards Mr. Webber back pay for the period between July 15, 2001, the date of his termination, and December 31, 2001.<sup>6</sup> The salary allocable to the 169-day period between July 15, 2001 and December 31, 2001 is \$ 27,384.02.

#### B. Reinstatement and Front Pay

"Reinstatement is the overarching preference among all equitable remedies under the ADA as it most efficiently furthers the dual goals of providing full coverage for the plaintiff and of deterring such conduct by employers in the future." *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d at 19 (internal quotations omitted). This preference and the reasoning behind it apply by extension to equitable remedies under the MHRA. See *Winston v. Me. Tech. College Sys.*, 631 A.2d 70, 74 (Me. 1993).

The question before the Court is whether IP can and

should reinstate Webber to his former position. See *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d at 18. Mr. Webber has not argued that he is more qualified than the project engineers that remained in the department following the July 2001 reduction in force, and two additional project engineer positions were eliminated in the autumn of 2003.<sup>7</sup> It is clear that there is no available opening for a project engineer at the Bucksport mill; indeed David Libby, the human resources manager, testified that there were no open positions anywhere at the mill. Nevertheless, IP has offered to create a position for Mr. Webber, for the same compensation as he was receiving at the time of his termination, in order to avoid front pay liability. Under IP's proposal, Mr. Webber would first be employed doing primarily sedentary work in a project to reduce storeroom inventory, a project that is anticipated to last "for the next couple of years." (Evid. Hr'g Tr. at 72.) Although the nature of his work following the completion of the storeroom inventory project is uncertain, IP's proposal includes creating a position that would survive the project. Mr. Webber argues against reinstatement on the grounds that it would be impracticable.

Because Mr. Webber's former position no longer exists, this Court has discretion to refuse reinstatement. See *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d at 18. Despite the preference for reinstatement, the Court finds that re-employment in a newly-created position with uncertain future prospects is an inadequate remedy for past discrimination and that such a remedy would likely require significant judicial oversight well into the future. Therefore, the Court declines to order the proposed "reinstatement."

In a case such as this, where reinstatement is not feasible, the Court has discretion to award a successful plaintiff front pay from the date of judgment forward. See *Carey v. Mt. Desert Island Hosp.*, 156 F.3d 31, 40 (1st Cir. 1998); *Wilcox v. Stratton Lumber, Inc.*, 921 F. Supp. 837, 844 (D. Me. 1996). "The burden falls on the plaintiff to prove the amount, if any, of a front pay award." *Wilcox v. Stratton Lumber*, 921 F. Supp. at 844.

In the exercise of its discretion, the Court finds that Mr. Webber has been more than adequately compensated for his injury by the award of compensatory damages and back pay. Furthermore, any award of front pay would be speculative: it is unclear how long Mr. Webber would have been able to continue working at the mill given his health difficulties, and it is unclear how long a position would have been available for him at the Bucksport mill, which continues to experience reductions in force.

### C. Statutory Cap on Compensatory Damages

The Maine Human Rights Act sets a statutory cap on the sum of compensatory and punitive damages awarded to a successful plaintiff. 5 M.R.S.A. § 4613(2)(B)(8). The applicable cap in this case is \$ 300,000. *Id.* The jury awarded Mr. Webber \$ 1,000,000 in compensatory damages and \$ 2,000,000 in punitive damages. The Court hereby reduces the awards of compensatory and punitive damages to \$ 300,000 and \$ 0, respectively, to bring the damages awarded to the statutory maximum.



#### D. Prejudgment Interest

Prejudgment interest is an element of compensatory damages. See *Moholland v. Empire Fire & Marine Ins. Co.*, 2000 ME 26, 746 A.2d 362, 364 (Me. 2000). Because the jury awarded Mr. Webber compensatory and punitive damages in excess of the statutory cap and the Court has reduced the award to the maximum amount allowed by statute, Mr. Webber cannot recover any amount of prejudgment interest on the amount awarded by the jury. The Court next turns to the question of whether prejudgment interest should be assessed on the back pay award.

In 2003, the Maine Legislature repealed the previously-existing provision on prejudgment interest (which provided that prejudgment interest "shall be assessed") and enacted a new provision, providing that prejudgment interest "is allowed." Compare 14 M.R.S.A. § 1602 (2002) with 14 M.R.S.A. § 1602-B (2004). The new legislation "applies to judgments entered on or after July 1, 2003." 2003 Me. Legis. Serv. 460 (West). Section 1602-B(5) provides that "on petition of the nonprevailing party and on a showing of good cause, the trial court may order that interest awarded by this section be fully or partially waived." Although Mr. Webber addressed the issue of prejudgment interest in his Proposed Findings of Fact and Conclusions of Law, IP made no response whatsoever. As such, the Court does not reach the issue of whether there exists good cause not to award prejudgment interest on the back pay award because there was no petition that such interest be waived. Prejudgment interest on the back pay award shall be calculated at an 8% rate pursuant to 14 M.R.S.A. § 1602-B(7)(A).

69a

SO ORDERED.

/s/ George Z. Singal

Chief U.S. District Judge

Dated this 26th day of February 2004.

70a

CIVIL NO: 02-63-B-S

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE

GARY S. WEBBER,  
PLAINTIFF,

v.

INTERNATIONAL PAPER COMPANY,  
DEFENDANT.

June 9, 2004, Decided

COUNSEL: For GARY S WEBBER: ARTHUR J.  
GREIF, LEAD ATTORNEY, JULIE D. FARR,  
GILBERT & GREIF, P.A., BANGOR, ME.

For INTERNATIONAL PAPER COMPANY:  
JONATHAN P. HARMON, LEAD ATTORNEY,  
MCGUIRE, WOODS, RICHMOND, VA.

For INTERNATIONAL PAPER COMPANY: KATE  
S. DEBEVOISE, LEAD ATTORNEY, BERNSTEIN,  
SHUR, SAWYER, & NELSON, PORTLAND, ME.

For INTERNATIONAL PAPER COMPANY:  
PETER M. WEATHERBEE, LEAD ATTORNEY,  
WEATHERBEE, WOODCOCK, BURLOCK AND  
WOODCOCK, BANGOR, ME.

For INTERNATIONAL PAPER COMPANY:  
VINCENT J. MIRAGLIA, LEAD ATTORNEY,  
MCGUIRE WOODS LLP, WASHINGTON, DC.

JUDGES: George Z. Singal, Chief U.S. District Judge.

OPINIONBY: George Z. Singal

OPINION:

ORDER ON PLAINTIFF'S MOTION TO AMEND  
AND DEFENDANT'S MOTION FOR  
JUDGMENT AS A MATTER OF LAW OR IN THE  
ALTERNATIVE FOR A NEW TRIAL  
SINGAL, Chief District Judge.

Plaintiff Gary Webber sued International Paper Company ("IP") alleging that his dismissal as part of a reduction in force was motivated by his disability, in violation of the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4551-4634. The action was removed to federal court based on diversity jurisdiction. At trial, a jury found for Mr. Webber and awarded compensatory and punitive damages, which the Court subsequently reduced to \$ 300,000 compensatory damages pursuant to 5 M.R.S.A. § 4613(2)(B)(8). Finding that Mr. Webber removed himself from the labor market at the end of 2001, this Court awarded Mr. Webber back pay of \$ 27,384.02, plus prejudgment interest.

Presently before the Court are IP's renewed motion for judgment as a matter of law and motion in the alternative for a new trial (Docket # 122) and Mr. Webber's motion to amend the findings of fact and conclusions of law relating to back pay (Docket # 121). For the reasons set forth below, the Court GRANTS both IP's motion for judgment as a matter of law and its alternative motion for a new trial; Mr. Webber's motion to amend is rendered MOOT.

## I. FACTS

In deciding a renewed motion for judgment as a matter of law, the Court must look at the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. See *Guilloty Perez v. Pierluisi*, 339 F.3d 43, 50 (1st Cir. 2003). The Court must not "consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight [\*\*3] of the evidence." *Id.* The Court reviews the record as a whole, but disregards "all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

In the light most favorable to Mr. Webber, the facts relevant to IP's renewed motion for judgment as a matter of law are as follows. From the early 1980s until he was laid off in July of 2001, Mr. Webber worked at the Bucksport mill in Bucksport, Maine. The Bucksport mill manufactures coated paper for use in magazines and catalogs. At the time of Mr. Webber's termination, the Bucksport mill was owned and operated by Defendant International Paper. In the summer of 2001, International Paper instituted a corporation-wide reduction in force dubbed "Functional FAST," with the objective of reducing by three thousand the number of "corporate overhead" positions (those positions not directly involved in the manufacture of paper).

On June 15, 2001, Fred Oettinger, the manager of the Bucksport mill, met with Roger Purlington, IP's coated paper manufacturing director, and Bill Pierre, the human resources director for coated paper mills, both of



whom worked at IP's Memphis offices. Also present at the meeting were Jeff Hamilton, the mill's operations manager, and David Libby, the mill's human resources manager. Serge Sorokin, in training to replace Mr. Purlington, participated from Memphis via telephone. At the meeting, Mr. Oettinger was directed by his superiors to eliminate twenty-one positions at the mill, including eight engineers. He was further advised that the Bucksport mill employed ten mechanical project engineers whereas comparable mills employed only six; he was instructed to pare down the number of project engineers.

Mr. Oettinger decided to reduce the number of project engineers by two, to a total of eight. Of the project engineers, Mr. Oettinger decided to eliminate the positions of Mr. Webber and Wayne Jacobs. Mr. Oettinger testified that he selected Mr. Webber because he did not have an engineering degree and was not capable of working on the high-end engineering projects directly related to the manufacture of paper. Mr. Webber acknowledged that he was less qualified than other project engineers and that there were indeed projects that he was not qualified to do. Mr. Webber only identified one project engineer, Wayne Jacobs, whom he believed to be less qualified than he. Notably, Mr. Jacobs was laid off the same week as Mr. Webber.

Most individuals whose positions were eliminated as part of Functional FAST were notified of their termination on Monday, June 25, 2001. On June 22, Mr. Oettinger told Larry Schaub, the engineering manager, and Stephen Moser, the maintenance engineer manager, about his decisions regarding the termination

of project engineers. The undisputed testimony indicates that Mr. Oettinger had already made his decision before he spoke with Mr. Schaub and Mr. Moser. Neither acted to save Mr. Webber's job.

On the morning of June 25, 2001, Mr. Webber met with Mr. Oettinger and Mr. Libby, and was informed that his position was being eliminated and his employment terminated. When Mr. Webber asked why he had been chosen, Mr. Oettinger told him that it was because of the quantity and quality of his work, and that his capabilities were limited by the fact that he did not have an engineering degree.

Mr. Webber suffers from problems with his knees, which have necessitated several surgeries since 1997. As a result of his knee troubles, Mr. Webber's mobility is limited, and he walks with a cane. His knee surgeries have sometimes required extended absences from work. Following the advent of his knee difficulties, IP accommodated each of his requests related to his disability. Mr. Webber was permitted to park his car inside the mill, something that no other employee (including the mill manager) did. He received permission to use the freight elevator in the main office building, where his workstation was located, and stair glide chairs were installed in the main office building and the employee development center building at Mr. Webber's request. Mr. Schaub permitted Mr. Webber to work from home, and IP provided a laptop computer for that purpose. Mr. Schaub also worked with Mr. Webber to allow him to work a part-time schedule while recovering from a knee surgery. Mr. Schaub assigned some physical aspects of Mr. Webber's job to other employees. Finally, Mr. Webber was reassigned

from an office on the third floor to an office on the first floor at his request.

The comments presented by Mr. Webber to support an inference that he was terminated because of disability discrimination are as follows: (1) an unattributed maxim that Mr. Webber heard during his time at the mill that "salaried people do not get hurt"; (2) a comment made by Steven Finley (then one of Mr. Webber's supervisors) in December 1997 that if Mr. Webber lost twenty pounds, he would have fewer problems with his knee, at which Mr. Finley and Mr. Schaub laughed; (3) the description of a stair-glide chair installed to help Mr. Webber reach his work station as a "Costanza chair" by Mr. Moser, Mr. Schaub (Mr. Webber's second-line supervisor) and Tom Thompson (Mr. Webber's first-line supervisor), in reference to an episode of the television show "Seinfeld" in which the character George Costanza fakes a disability; (4) a discussion with Dr. Read, the mill doctor, in January or February of 2001, two weeks before a scheduled knee surgery, at which Dr. Read suggested that Mr. Webber should go home to avoid injuring himself at the mill; (5) an inquiry by Mr. Thompson in May or June of 2001 as to how long it would take for Mr. Webber's knee to heal; and (6) a comment by Mr. Thompson on June 25, 2001, just before Mr. Webber was notified of his termination (but after the decision to terminate his employment had been made), that "you're the weakest link, you're gone."

Mr. Webber also attempts to infer discriminatory animus from: (1) the mill manager's efforts to reduce work-related "lost-time" injuries; (2) the fact that Mr. Webber can do most of the tasks currently being performed by project engineers at the mill, even

without a degree; (3) IP's failure to offer Mr. Webber employment in a different position at the mill when his position was eliminated; and (4) evidence that Dale Wibberly (an employee in the mill's human resources department) had suggested to one of his superiors that Mr. Webber be removed from the list of employees to be laid off because he was not yet back full-time following a knee surgery.

## II. THE MOTION FOR JUDGMENT AS A MATTER OF LAW

### A. Overview

The Maine Human Rights Act prohibits employers from, *inter alia*, "discriminating against a qualified individual with a disability because of the disability of the individual in regard to [the] . . . discharge of employees." 5 M.R.S.A. § 4572(2). "Because the MHRA generally tracks federal anti-discrimination statutes, it is appropriate to look to federal precedent for guidance in interpreting the MHRA." *Winston v. Me. Technical Coll. Sys.*, 631 A.2d 70, 74 (Me. 1993) (quoted in *Doyle v. Dep't Human Servs.*, 2003 ME 61, 824 A.2d 48, 54 n.7 (Me. 2003)). The parties stipulated that Mr. Webber was "a qualified person with a disability within the meaning of the Maine Human Rights Act." As a result, the only remaining issue for trial was whether Mr. Webber's termination was the product of illegal discrimination based on his disability.

The question before the Court in a motion for judgment as a matter of law is whether the facts and inferences are such that no reasonable factfinder could have reached a verdict against the movant. See *Santos v.*

Sunrise Med., Inc., 351 F.3d 587, 590 (1st Cir. 2003). Because Mr. Webber presents only circumstantial evidence of discrimination, the sufficiency of his claim is evaluated using the burden-shifting analysis established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). See *Me. Human Rights Comm'n v. Auburn*, 408 A.2d 1253, 1261-62 (Me. 1979). In the initial step, Mr. Webber must establish a *prima facie* case of discrimination. The *prima facie* case is "a small showing that is not onerous and is easily made." *Kosereis v. Rhode Island*, 331 F.3d 207, 213 (1st Cir. 2003) (internal quotations and citations omitted). It creates an inference of discrimination, which "fades away" when the employer offers a non-discriminatory reason for the employment action in question. *Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 39 (1st Cir. 2003). Once the employer has offered an alternative reason for the adverse employment action, "all that remains is for the plaintiff to show that the adverse employment action was the result of discriminatory animus." *Id.*

The Court assumes, without deciding, that Mr. Webber established a *prima facie* case of disability discrimination against IP.<sup>1</sup> Based on this assumption and IP's proffer of a nondiscriminatory reason for terminating Mr. Webber (the company-wide reduction in force, combined with his lack of an engineering degree), the *McDonnell Douglas* framework is left behind, and the Court focuses on the central issue in this case: whether a reasonable jury could have concluded that Gary Webber was included in the July 2001 reduction in force because of his disability. Cf. *Conway v. Electro Switch Corp.*, 825 F.2d 593, 599 (1st Cir. 1987) (noting that "in any sex discrimination case,



the ultimate issue is whether the defendant intentionally discriminated against the plaintiff on the basis of sex").

IP explained that Mr. Webber was among those discharged in the July 2001 reduction in force because it had been determined that two project engineer positions would be eliminated, and Mr. Webber was one of the two least-qualified project engineers. Mr. Webber had the burden of proving by a preponderance of the evidence that this was (1) not the real reason for his termination, and (2) that the actual reason for his termination was discrimination on the basis of his disability. See *Reeves*, 530 U.S. at 146-47; *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 45 (1st Cir. 2002).

As explained below, the Court concludes that no reasonable factfinder could find that IP's proffered reason for Mr. Webber's termination was pretextual, and that even assuming the proffered reason was pretext, no reasonable factfinder could find that Mr. Webber's termination was the product of disability discrimination.

#### B. Pretext

In order to create a question of fact as to pretext, Mr. Webber must do more than discredit the rationale behind his selection for the reduction in force: he must generate a genuine dispute about the honesty of the company's assertion that he was selected because he was among the least-qualified employees in a project engineer position. See *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158 (7th Cir. 1996) ("The central



question in any employment-discrimination case is whether the employer would have taken the same action had the employee been of a different race (age, sex, religion, national origin, etc.) and everything else had remained the same."), quoted in *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 431 (1st Cir. 2000). This he has not done.

1. **Discriminatory Comments.** One way of creating a question of fact as to pretext is to show discriminatory comments made by the key decisionmaker or one in a position to influence the decisionmaker. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000). Although Mr. Webber argues that the evidence of various comments made to him over the years of his employment allows an inference of pretext, none of these comments is adequately tied to the decisionmaker to allow such an inference.

Mr. Webber agreed that there was no evidence that Mr. Oettinger, the key decisionmaker, harbored any discriminatory animus, and there was no showing of discriminatory animus on the part of any of the individuals involved in the decision-making process (Mr. Purlington, Mr. Pierre, Mr. Hamilton, Mr. Libby, and Mr. Sorokin).<sup>2</sup> Mr. Webber made no argument that the reduction in force itself, or the decision to reduce the number of project engineers by two, was motivated by discriminatory animus. Mr. Webber is left with a mixed bag of statements about his knees made over the course of his employment, which he hopes will somehow impart discriminatory animus to a decision made by a non-discriminatory decisionmaker. This approach cannot succeed.

The only comments that Mr. Webber even argues could be related to the decisionmaking process are the comments of Mr. Schaub and Mr. Moser. It is true that an employer may be held liable for employment discrimination where the decisionmaker harbored no discriminatory animus, but made the decision based on false or misleading information provided by an employee who did harbor such animus. *Cariglia v. Hertz Equipment Rental Corp.*, 363 F.3d 77, 87-88 (1st Cir. 2004). However, even if the temporally remote and non-employment-related comments of Mr. Schaub and Mr. Moser could be construed as evidence of discriminatory animus, there is no evidence that Mr. Schaub and Mr. Moser provided negative information to influence Mr. Oettinger's decision to include Mr. Webber in the reduction in force, or failed to correct misunderstandings of fact held by Mr. Oettinger. Although Mr. Schaub and Mr. Moser were informed of Mr. Webber's impending termination, they took no action. A discriminator's failure to disagree with a superior's non-discriminatory termination decision cannot breathe discriminatory intent into an otherwise innocuous employment action. To hold otherwise would allow every plaintiff who could produce evidence of another employee's discriminatory animus to impute that animus to a decisionmaking process in which the discriminatory individual played no part, but could have. This would undermine the requirement that the plaintiff show that the disability "was the determining factor in an adverse employment action." *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002) (emphasis in original); see also *Doyle v. Dep't Human Servs.*, 824 A.2d at 54. It would also prevent an employee who knew that she could not make nondiscriminatory decisions about another employee

from recusing herself from decisionmaking about that employee, a result clearly contrary to the purpose of the MHRA.

Having reviewed all the comments relied upon by Mr. Webber, it is clear to this Court that there is no evidence to tie the allegedly discriminatory comments to Oettinger's decision, and consequently those comments do not tend to show that the proffered reason for Mr. Webber's termination was pretextual.

2. Weaknesses or Implausibilities in the Employer's Explanations of the Termination Decision. A second way of creating a question of fact as to pretext is by showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons such that a factfinder could infer that the employer did not act for the asserted non-discriminatory reasons." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d at 56 (internal quotations omitted). IP maintained that Mr. Webber was included in the reduction in force because of the general cost-cutting measures imposed by Functional FAST, combined with the fact that he was the only project engineer without an engineering degree, making him less qualified than other project engineers. Mr. Webber attempted to contradict this explanation by arguing that the mill now outsources most of the projects that he is not qualified to manage. Mr. Webber characterizes this outsourcing as "strong circumstantial evidence that Defendant's proffered reason for Mr. Webber's termination . . . is pretextual." This characterization is unmerited. An employee is not permitted to substitute his own judgment as to his qualifications for those of his employer. See *Shorette v.*

Rite Aid of Me., Inc., 155 F.3d 8, 15 (1st Cir. 1998) ("It is well settled . . . that a plaintiff's own opinions about [his] work performance or qualifications do not sufficiently cast doubt on the legitimacy of [his] employer's proffered reasons for its employment actions.") (quoting *Ost v. W. Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 441 (7th Cir. 1996)). IP was permitted to terminate Mr. Webber on any legal ground, including his professional qualifications. The fact that Mr. Webber may still have been able to do his job does not merit the inference that the reason proffered by IP for selecting Mr. Webber for termination was false. See *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 423 (1st Cir. 1996) ("The elimination of a position signifies the employer's belief that it can get by with one less helper; it does not necessarily convey a belief that the work the employee had been doing was superfluous and need not be performed at all.").

Neither has Mr. Webber shown any inconsistencies in the rationale given for his termination; it is undisputed that he was the only person without an engineering degree to be employed as a project engineer, and Mr. Webber was unable to identify any retained project engineer who was less qualified than he. Indeed, Mr. Webber recognized that an engineering degree was listed as "required criteria" in the project engineer job description.

Mr. Webber places great weight on the fact that he was not transferred to the position of SQA Coordinator, a position he had previously sought and which was not filled at the time of his termination. However, an employer is not obligated to offer an employee a transfer or relocation during a reduction in force. See

Pages-Cahue v. Iberia Lineas Aereas de Espana, 82 F.3d 533, 539 (1st Cir. 1996). Absent other evidence that Mr. Webber was included in the group of laid-off employees based on discriminatory animus, the failure to offer him an unoccupied position during a period of downsizing does not lead to the conclusion that the reason proffered by IP was untrue, or that his termination was based on discriminatory animus. At most, it would constitute evidence that IP did not want Mr. Webber as an employee, regardless of his position. See Smith, 76 F.3d at 422 ("There is little doubt that an employer, consistent with its business judgment, may eliminate positions during the course of a downsizing without violating Title VII even though those positions are held by members of protected groups.").

In what is arguably his strongest attempt to establish a question of fact as to pretext from the evidence presented at trial, Mr. Webber attempts to tease an inference of disability discrimination from Mr. Oettinger's explanation, at the June 25, 2001 meeting, that Mr. Webber was being let go because of the quality and quantity of his work.<sup>3</sup> This effort is unavailing, for as Mr. Webber emphasizes in his memorandum, Mr. Oettinger did not review any of Mr. Webber's performance evaluations, look at any of the projects Mr. Webber had contributed to, or speak with any of Mr. Webber's supervisors before making his decision. (In the course of his job as mill manager, Mr. Oettinger reviewed all expenditures over \$ 10,000, and was generally familiar with the types of work performed by different project engineers.) The fact that no complaints were made about the quality and quantity of Mr. Webber's work prior to his termination does not reveal a weakness or implausibility in IP's



explanation that he was let go because he was one of the least qualified engineers. Viewing the record as a whole (including the strong evidence supporting IP's proffered reason for Mr. Webber's termination) in the light most favorable to Mr. Webber, Mr. Oettinger's statement can only mean that Mr. Webber could not do certain work because of his professional qualifications. It does not allow the inference that IP's proffered reason was false or that Mr. Webber's termination was based on his disability or his attendant leaves of absence.

Based on the foregoing discussion and its review of the record, the Court concludes that Mr. Webber did not create a question of fact as to whether IP's proffered reason for his termination was pretextual.

### C. Discrimination.

Assuming *arguendo* that the evidence introduced in this case was sufficient for a reasonable factfinder to conclude that the reasons given for Mr. Webber's termination were pretextual, there is insufficient evidence for a reasonable jury to find that the true reason for Mr. Webber's termination was disability discrimination.

Even if Mr. Webber could establish pretext, there is a dearth of evidence from which a reasonable factfinder could conclude that the real reason for his termination was his disability. "Proof that the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason is correct." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. at 146-47 (internal

quotations and punctuation omitted). Reeves explained that although a plaintiff in an employment discrimination case must prove both that the employer's proffered reason for terminating the employee was false and that the reason offered is a pretext for discrimination, the falsity of the proffered reason may permit the inference that the actual reason for the employment action in question was illegal discrimination. 530 U.S. at 147. However, the Reeves court clarified that this is not always the case:

This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted evidence that no discrimination had occurred.

*Id.* at 148 (emphasis in original). In this case, the evidence is conclusive that Mr. Webber was included in the reduction in force because of his lack of professional qualifications: there was no showing that Mr. Oettinger or any of the other decisionmakers involved harbored discriminatory animus,<sup>4</sup> and no suggestion that the decision to eliminate two project engineer positions was influenced by impermissible discrimination. It is undisputed that Mr. Webber was less qualified than the

retained project engineers.

The comments relied on by Mr. Webber either lack temporal proximity to the decision to terminate his employment, are "textbook example[s] of [] isolated remark[s] which demonstrate[] nothing," see *Shorette v. Rite Aid of Me., Inc.*, 155 F.3d at 13, or show no evidence of discriminatory mindset. The comments were in no way tied to the conditions of employment or Mr. Webber's qualifications for such employment. Moreover, the accommodations made for Mr. Webber's disability are inconsistent with a bias against disabled employees. Cf. *Smith v. F.W. Morse & Co.*, 76 F.3d at 423 (noting that promotion and increase in compensation in advance of six-week maternity leave were "inconsistent with a bias against pregnant employees.")

Even if the comments made by Mr. Schaub and Mr. Moser could be attributed to the decisionmaking process in spite of Mr. Schaub and Mr. Moser's mere acquiescence in Mr. Oettinger's decision, they do not allow an inference that the true reason for Mr. Webber's termination was animus towards persons with disabilities. First, Mr. Schaub's reaction to the comment regarding weight loss almost four years before Mr. Webber's termination is too remote in time to have any probative value with respect to the reason for Mr. Webber's termination. See *McMillan v. Mass. Soc. for the Prevention of Cruelty to Animals*, 140 F.3d 288, 300-301 (1<sup>st</sup> Cir. 1998) (noting, while upholding the district court's admission of certain evidence, that "stray remarks may properly constitute evidence of discriminatory intent for the jury to consider in combination with other evidence," but that "even if the

remarks are relevant for the pretext inquiry, their probativeness is circumscribed if they were made in a situation temporally remote from the date of the employment decision . . . or if they were not related to the employment decision in question or were made by nondecisionmakers.") Even if the suggestion that Mr. Webber lose some weight were close enough in time to have some probative value, that value would be undermined by the fact that the comment did not exhibit hostility toward Mr. Webber's disability, or involve his employment at all. See *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 36 (1st Cir. 2001) ("Although statements directly related to the challenged employment action may be highly probative in the pretext inquiry, mere generalized 'stray remarks,' arguably probative of bias against a protected class, normally are not probative of pretext absent some discernible evidentiary basis for assessing their temporal and contextual relevance.") (emphasis in original) (internal citations omitted). Second, as for the "Costanza chair" comments about the stair glide chair, even assuming the worst (as the Court is obligated to), these comments would indicate that Mr. Schaub and Mr. Moser thought that Mr. Webber was feigning a disability, not that he was an undesirable employee because he had a disability.

The remaining comments consist of remarks that were not even arguably linked to decisionmakers or the decisionmaking process. Thus, any probative value they might have toward showing the true reason for an employment action is slight. See *Wallace v. O.C. Tanner Recognition Co.*, 299 F.3d 96, 100-01 (1st Cir. 2002) (describing questions about an employee's retirement plans as "brief, stray remarks unrelated to the

termination decisional process," noting that there was "no accompanying suggestion that [the plaintiff's] value to the company had diminished because of his age," and stating that the effect of the comments by prior supervisors on the strength of the plaintiff's case was "circumscribed - if not entirely negated -- by the fact that neither of them played a role in the termination. "); Santiago-Ramos, 217 F.3d at 55 ("Typically, statements made by one who neither makes nor influences a challenged personnel decision are not probative in an employment discrimination case.") (internal quotation omitted). Even assuming the maxim that "salaried people do not get hurt" was generally attributable to the mill management, the statement does not indicate a distaste for or a devaluation of persons with disabilities. At the very worst, it could be taken to mean that salaried employees should not report work-related injuries.

To sum up, even if there were sufficient evidence from which a jury could conclude that the reasons offered by IP for Mr. Webber's termination were untrue, Mr. Webber simply did not present enough evidence to allow an inference that the true reason for his dismissal was disability discrimination. See Zapata-Matos, 277 F.3d at 47 ("The slight suggestion of pretext present here, absent other evidence from which discrimination can be inferred [does not meet] plaintiff's ultimate burden.")

### III. THE MOTION FOR A NEW TRIAL

A motion for a new trial involves greater discretion on the part of the district court: such a motion may be granted only if "the outcome is against the clear weight



of the evidence such that upholding the verdict will result in a miscarriage of justice." *Johnson v. Spencer Press of Me., Inc.*, 364 F.3d 368, 375 (1st Cir. 2004). In the exercise of that discretion, and in light of the foregoing discussion, the Court alternatively holds that IP would be entitled to a new trial in the event that the ruling of this Court granting the motion for judgment as a matter of law is reversed.

#### IV. CONCLUSION

While Mr. Webber has plenty of concerns about the way in which he was terminated, this Court "does not assume the role of a super personnel department, assessing the merits -- or even the rationality -- of employers' nondiscriminatory business decisions." *Ruiz v. Posadas De San Juan Assocs.*, 124 F.3d 243, 250 (1st Cir. 1997) (internal quotations omitted). "Insofar as Title VII [and by extension, the MHRA] is concerned, an employer can hire or fire one employee instead of another for any reason, fair or unfair, provided that the employer's choice is not driven by race, gender, pregnancy, or some other protected characteristic." *Smith*, 76 F.3d at 422. In the absence of any evidence connecting the decision to eliminate his position to discrimination against persons with disabilities, the Court GRANTS IP's Motion for Judgment as a Matter of Law.

Alternatively, the Court GRANTS International Paper's Motion for a New Trial. Because Mr. Webber is not entitled to back pay where the jury verdict rendered in his favor is contrary to law, his motion to amend this Court's Findings of Fact and Conclusions of Law is rendered MOOT.

SO ORDERED.

/s/ George Z. Singal

Chief U.S. District Judge

Dated this 9th day of June, 2004.

n1 The Court notes that IP may have waived its argument that Mr. Webber failed to establish a prima facie case by failing to include the argument in its initial motion for judgment as a matter of law pursuant to Rule 50(a). See *Larch v. Mansfield Mun. Elec. Dep't*, 272 F.3d 63, 72 (1st Cir. 2001) (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2537 (2d ed. 1994)).

n2 Thus, any of these individuals' mere knowledge of Mr. Webber's disability is not probative of pretext or discrimination.

n3 On the date he was terminated, Mr. Webber was working part-time as he transitioned back into the workplace after a knee surgery.

n4 Mr. Webber attempts to infer discriminatory animus from the mill manager's efforts to reduce work-related injuries and "lost-time" injuries. The mere fact that an employer takes steps to promote workplace safety does not allow the factfinder to infer that the employer harbors animus towards people with disabilities. Moreover, Mr. Webber's claim is based on disparate treatment, not disparate impact, and as such, he must produce evidence that he was terminated because of his disability.

91a

No. 04-1796

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

GARY S. WEBBER,  
Plaintiff, Appellant,

v.

INTERNATIONAL PAPER COMPANY,  
Defendant, Appellee.

Boudin, Chief judge, Coffin, Senior Circuit Judge.  
Torruella, Selya, Circuit Judges Cyr, Senior Circuit  
Judge, Lynch, Lipez and Howard, Circuit Judges.

ORDER OF COURT

Entered: September 20, 2005

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en bane has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en bane having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en bane, it is ordered that the petition for rehearing and petition for rehearing en bane be denied.

By the Court:

Richard CushinDonovan,  
Clerk

MARGARET CARTER  
Chief Deputy Clerk

No. 05-806

FILED  
JAN 25 2006

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

IN THE  
**Supreme Court of the United States**

GARY S. WEBBER,

*Petitioner,*

v.

INTERNATIONAL PAPER COMPANY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

**BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Did the First Circuit correctly affirm the district court's decision granting International Paper's Renewed Motion For Judgment as a Matter of Law because Petitioner Gary Webber ("Webber")—the only engineer in his engineering department without an engineering degree—failed to present legally sufficient evidence that his position was eliminated because of his disability, rather than his lack of engineering degree?



**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Court Rule 29.6, International Paper Company makes the following disclosure:

International Paper Company has no parent company and no publicly held company owns 10% or more of International Paper Company's stock.

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## INTRODUCTION

Both the Questions Presented and the Reasons for Granting the Petition, as presented by Webber, inaccurately set forth the First Circuit's holding and analysis. It is regrettable that Webber has crafted the Questions Presented and Reasons for Granting the Petition in such a way as to create the illusion of a conflict with Supreme Court precedent where, in reality, none exists.

The First Circuit's opinion is wholly consistent with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and does not implicate *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). In reliance on well-settled First Circuit precedent that is consistent with *Reeves*, the First Circuit reviewed "all the evidence, reasonable inferences, and credibility determinations in the light most favorable to" Webber. *Webber v. International Paper Co.*, 417 F.3d 229, 233 (1<sup>st</sup> Cir. 2005). Webber's arguments that the First Circuit (1) improperly credited disputed testimony; (2) resolved conflicting testimony; and (3) ignored evidence that pointed towards disability discrimination are without merit.

Contrary to Webber's contention, the First Circuit's holding does not implicate this Court's decision in *O'Connor* because the First Circuit did not affirm the district court's decision based on Webber's failure to establish a *prima facie* case. Instead, the Court looked at the strength of Webber's *prima facie* case as a factor in determining that Webber failed to meet his burden of proof.

## STATEMENT OF THE CASE

Fred Oettinger ("Oettinger"), the Mill Manager, was responsible for twelve different departments at the Mill, including the maintenance and engineering department. A-255-257. Project engineers were a part of the engineering department. *Id.* A "BS degree in Mechanical or Civil Engineering" was a "[r]equired criteria" for the project engineer position. A-21.

### *The Mill Accommodates Webber's Knee Injury*

Webber injured his knee in 1997. A-161. From 1997 through his downsizing in the summer of 2001, Webber requested numerous accommodations. Webber received every accommodation he requested.<sup>1</sup> A-171-72. These accommodations included:

- working from home for a total of 7 ½ months in 1999 and 2000;
- providing Webber with a laptop computer;
- providing Webber with a light duty job;
- reassigning Webber from a 3<sup>rd</sup> floor office to a 1<sup>st</sup> floor office;

---

1. Webber's Petition contends that the First Circuit "stressed accommodation [sic] IP gave to Mr. Webber, A-3a, but ignored the long delay in implementing them. A-96-100, A-198-199." The record does not support Webber's claim that there was a long delay in implementing any of the accommodations International Paper afforded Webber.



- installing "glide chairs" in two different buildings;
- providing Webber with a reduced hour or part-time schedule;
- reassigning some of the physical aspects of Webber's job;
- permitting Webber to park inside the Mill, even though there were four handicap parking spaces in the employee lot and the Mill Manager did not park inside the Mill.

A-162-72.

*The Corporate Reduction in Force: "Functional Fast"*

In 2001, International Paper underwent a nationwide reduction in force called "Functional Fast." A-260. As part of Functional Fast, International Paper determined that it needed to reduce staff levels by 3000 employees in certain areas of the business to reduce costs. *Id.*

In June 2001, Oettinger learned that he had to reduce the Mill's technical staff positions from 47 to 39 positions as part of Functional Fast. A-262. In a meeting with his Human Resources Manager, David Libby, his Operations Manager, Jeff Hamilton, and three corporate managers from Memphis, Oettinger determined that he would need to eliminate two project engineer positions. *Id.* At that time, the Mill had ten project engineers while other comparable International Paper mills had only six project engineers. *Id.*

*Oettinger Selects Webber As Part Of The Downsizing*

Of the ten project engineers in Bucksport, Oettinger had to decide which two engineers were the least valuable to the business. A-263. Webber was one of two project engineers selected. A-263. Oettinger selected Webber because he was the only project engineer who did not possess an engineering degree. A-264. Oettinger believed that without an engineering degree Webber was unable to do some of the projects that degreed engineers were qualified to perform, so he was relegated to performing lower level types of projects such as office renovations. A-265. While Oettinger discussed these selections with Libby and Hamilton, Oettinger made the final decision. A-237, A-263, A-440.

After he made his decision, Oettinger met with Webber's first- and second-line supervisors Larry Schaub and Steve Moser, on Friday, June 22, 2001. *Id.* Both Schaub and Moser agreed with Oettinger's decision to eliminate Webber's position. A-311, A-355.

The next business day, Monday, June 25, 2001, Oettinger and Libby met with Webber and advised him that his position would be eliminated effective July 15, 2001 due to Functional Fast. A-125, A-268-69. According to Webber, in response to Webber's question about why he was selected, Oettinger told him that it was because of the quantity and quality of his work. A-125-26. According to Webber, during the same brief conversation, Oettinger explained that because Webber did not have an engineering degree he "could not do the functions of an engineering position." A-127.

Notably Webber:

- failed to present any evidence that Oettinger harbored any animus or stereotypes towards people with disabilities; A-61;
- admitted that he was not more qualified than Nick Blanchard, Mr. Bennett, Mr. Cyr, and Mr. Thompson—engineers that were retained; A-174-75; and
- admitted that he—unlike all of the other engineers—did not have an engineering degree. A-173-174.

*The First Circuit Affirms the Entry of Judgment as a Matter of Law*

Relying in part on *Reeves*, the district court granted International Paper's Renewed Motion For Judgment As A Matter of Law after the jury returned a verdict in Webber's favor. The district court assumed Webber established a *prima facie* case. The district court then held that "no reasonable fact-finder could find that IP's proffered reason for Mr. Webber's termination was pretextual, and that even assuming the proffered reason was pretext, no reasonable fact-finder could find that Mr. Webber's termination was the product of disability discrimination." *Webber v. International Paper Co.*, 326 F. Supp. 2d 160, 166 (D. Me. 2004).

The First Circuit affirmed the district court's decision holding that "Webber failed to meet his burden of proof to show that the proximate cause of his termination was IP's discriminatory animus." *Webber*, 417 F.3d at 240 (1<sup>st</sup> Cir. 2005).

## REASONS FOR DENYING THE PETITION

The decision below does not conflict with *Reeves*, *O'Connor*, any decision of this Court, or any Court of Appeals for that matter. The First Circuit correctly affirmed the district court's decision granting International Paper's Renewed Motion For Judgment as a Matter of Law because Webber—the only engineer in his engineering department without an engineering degree—failed to present legally sufficient evidence that his position was eliminated because of his disability. The First Circuit properly viewed all of the evidence, reasonable inferences, and credibility determinations in the light most favorable to Webber.

Webber's attempt to demonstrate a conflict with *O'Connor* is unavailing. The First Circuit did not affirm the district court's decision because Webber failed to establish a *prima facie* case. Rather, in determining whether Webber had advanced sufficient evidence from which a reasonable jury could conclude that his job was eliminated because of his disability, the Court looked at many factors, including the strength of Webber's *prima facie* case.

While the failure or weakness of a *prima facie* showing will not alone constitute grounds for judgment for the employer, it significantly weighs in the balance when we assess whether the plaintiff adduced sufficient evidence overall from which a jury rationally might infer that the employer's articulated reason constitutes a pretext for discrimination, and that the real reason for the termination was discriminatory animus.

*Webber*, 417 F.3d at 235.

## **I. THE FIRST CIRCUIT CORRECTLY APPLIED REEVES.**

An appellate court reviews the district court's judgment entered as a matter of law *de novo*, weighing "all the evidence, reasonable inferences, and credibility determinations in the light most favorable to the nonmoving party (*viz* Webber.)" *Webber*, 417 F.3d at 234. While the appellate court is required to "draw all reasonable inferences in favor of the nonmoving party" it "must review the record 'taken as a whole.'" *Reeves*, 530 U.S. at 150 (2000) (internal citations omitted). The First Circuit correctly applied this standard.

In a desperate attempt to show that the First Circuit's holding contravenes *Reeves*, Webber argues that the First Circuit (1) improperly credited Oettinger's testimony; (2) resolved conflicting testimony between Oettinger and other witnesses; and (3) ignored evidence that pointed towards disability discrimination. Webber's arguments fail.

### **A. The First Circuit Did Not Rely Upon Oettinger's Disputed Testimony.**

Instead of showing that the First Circuit relied upon Oettinger's disputed testimony, Webber points to testimony that the First Circuit did not mention—much less rely upon—in its opinion. For instance, Webber argues that the First Circuit relied upon "Oettinger's claim that he had to make a hurried decision." Webber Petition at 13. In reality, the First Circuit's opinion does not mention that Oettinger's decision was hurried. Likewise, Webber argues that the First Circuit relied upon Oettinger's testimony that he eliminated eleven employees. *Id.* Again, the First Circuit's opinion does not

mention this testimony. Rather, the First Circuit's opinion mentions Oettinger's uncontradicted testimony that he had to reduce the "technical" staff (including engineers) by eight and that after learning that comparable sized mills had only six project engineers (he had ten) he decided to cut two project engineer positions. *Webber*, 417 F.3d at 233.

Last, Webber argues that the First Circuit improperly relied upon the number of people involved in the decision to eliminate his position. Webber argued that Oettinger testified "that he made the decision and only then consulted with 'the national office.'" Webber Petition at 13. This was not Oettinger's testimony. In fact, the First Circuit's opinion correctly states *the exact opposite*. "Following consultations with the national office, Oettinger eventually selected Webber and Wayne Jacobs for termination." *Webber*, 417 F.3d at 233. In sum, the First Circuit only considered Oettinger's unimpeached, uncontradicted testimony.

#### **B. The First Circuit Did Not Resolve Conflicting Testimony.**

Webber's argument that the First Circuit resolved conflicting testimony is disingenuous. In discussing whether Schaub or Moser's alleged animus could be attributed to Oettinger, the First Circuit recounted the difference between Webber's and International Paper's *characterization* (via counsel) of the evidence.

Webber notes (i) that Oettinger consulted with Schaub and Moser three days prior to the termination, and (ii) that Moser decided to mull the issue over during the weekend. IP counters that the purported animus on the part of Schaub



and Moser is irrelevant since Oettinger testified (i) that he was the only decisionmaker regarding Webber's termination, (ii) that he simply notified Schaub and Moser of his final decision, and (iii) that neither Schaub nor Moser either participated in or contributed to the decision. The truth is to be found somewhere between these two *characterizations*, however.

*Webber*, 417 F.3d at 236.

While "[r]esolving conflicting evidence is not the role of the appellate court" (*see Webber* Petition at 14), resolving counsel's conflicting characterizations and arguments is the role of the appellate court. Weighing evidence in a light most favorable to Webber, does not mean that the First Circuit was required to accept Webber's characterization of the evidence or record. Under *Reeves*, the Court "should review the record as a whole" giving all reasonable inferences to the nonmovant. The First Circuit weighed all reasonable inferences in Webber's favor but appropriately rejected his assertions and characterizations that the record did not support.

### **C. The First Circuit Did Not Omit Material Evidence.**

Webber argues that the First Circuit omitted material evidence. Webber is mistaken. The First Circuit considered most of the "omitted" evidence and the evidence not mentioned was immaterial. Webber argues that the Court failed to adequately consider International Paper's failure to offer Webber the SQA position. Contrary to Webber's contention, the Court considered Webber's evidence that

International Paper "could have transferred him to the open position of supplier quality assurance (SQA) coordinator." *Webber*, 417 F.3d at 240. Ultimately, the Court sided with well-settled First Circuit (and Seventh and Eleventh Circuit) law—that is, "an employer undertaking a RIF is not required to offer an employee a transfer to another job position." *Id.* citing *Pages-Cahue v. Iberia Lineas Aereas de Espana*, 82 F.3d 533, 538-39 (1<sup>st</sup> Cir. 1996).

Similarly, Webber argues that the First Circuit omitted International Paper's alleged failure to provide a "more detailed explanation[] . . . of why an engineering degree was essential to Mr. Webber's retention." Webber Petition at 17. However, the First Circuit considered Webber's argument and rejected it. *Webber*, 417 F.3d at 238 ("Under the business judgment rule, the possession of a degree can be a reasonable criterion for retaining on employee over another." (citations omitted)).

Webber also argues that the First Circuit ignored International Paper's alleged long delay in implementing the many accommodations it gave Mr. Webber. However, as mentioned, the record he cites does not support his assertion. See Webber Petition at 17 ("The First Circuit stressed accommodation [sic] IP gave to Mr. Webber, A-3a, but ignored the long delay in implementing them. A-96-100, A-198-199.") (emphasis added). Indeed, nothing in the record supports this assertion.

The remaining "omitted evidence" of discrimination (i.e. Oettinger knew Webber injured his knee at work, IP did not want workplace injuries, and Dr. Read ordered Webber to go home so he did not further injure himself) is immaterial and does not, in a light most favorable to Webber, tend to prove discrimination.

## II. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *O'CONNOR*.

Webber attempts to create a conflict with *O'Connor* where none exists. As an initial matter, the First Circuit did not affirm the district court's decision by holding that Webber failed to establish a *prima facie* case. To the contrary, in determining whether Webber had advanced sufficient evidence from which a reasonable jury could conclude that his job was eliminated because of his disability, the Court looked at many factors, including the strength of Webber's *prima facie* case.

While the failure or weakness of a *prima facie* showing will not alone constitute grounds for judgment for the employer, it significantly weighs in the balance when we assess whether the plaintiff adduced sufficient evidence overall from which a jury rationally might infer that the employer's articulated reason constitutes a pretext for discrimination, and that the real reason for the termination was discriminatory animus.

*Webber v. International Paper*, 417 F.3d at 235.

Moreover, even if the First Circuit had affirmed the district court's decision solely on the basis of Webber's failure to state a *prima facie* case, the Court's decision would not conflict with *O'Connor*. In *O'Connor* the sole question presented was "whether a plaintiff alleging that he was discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA) . . . must show that he was replaced by someone outside the age group protected by

the ADEA to make out a *prima facie* case. . . ." 517 U.S. at 309. Importantly, *O'Connor* was a "non-reduction-in-force case." 517 U.S. at 310 n.1. *Webber* was not.

The First Circuit—and every other Circuit in the country<sup>2</sup>—has recognized that there is a different standard for stating a *prima facie* case in the context of a reduction in force. *Udo v. Tones*, 54 F.3d 9, 12 (1<sup>st</sup> Cir. 1995); *LeBlanc v. Great American Insurance Co.*, 6 F.3d 836, 842 (1<sup>st</sup> Cir. 1993). Since *Webber* was a reduction-in-force case, and *O'Connor* was not, there would be no conflict between these two cases even if the First Circuit's holding was based solely on *Webber*'s failure to state a *prima facie* case.

2. *Monaco v. American General Assurance Co.*, 359 F.3d 296, 300-01 (3<sup>d</sup> Cir. 2004); *Dugan v. Albemarle Cnty School Bd*, 293 F.3d 716, 720 (4<sup>th</sup> Cir. 2002); *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1137 (10<sup>th</sup> Cir. 2000); *Skalka v. Fernald Envtl. Restoration Mgt. Corp.*, 178 F.3d 414, 420-21 (6<sup>th</sup> Cir. 1999); *Fisher v. Wayne Dalton Corp.*, 139 F.3d 1137, 1141 (7<sup>th</sup> Cir. 1998); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1316 (8<sup>th</sup> Cir. 1996); *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248, 252 (5<sup>th</sup> Cir. 1996); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 917 (9<sup>th</sup> Cir. 1996); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1082 (11<sup>th</sup> Cir. 1992); *Duncan v. NYC Transit Authority*, 2002 U.S. App. LEXIS 17674 at \*2-3 (2<sup>d</sup> Cir. 2002).

## CONCLUSION

Webber has failed to demonstrate any reason (and certainly not a *compelling* one) why this Court should grant his Petition. He has failed to demonstrate a conflict with any decision of this Court or that the First Circuit “departed from the accepted and usual course of judicial proceedings. . . .” Rule 10 (a), Rules of the Supreme Court of the United States. Consequently, Webber’s Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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FEB 7 - 2006

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FOR THE FIRST CIRCUIT

**REPLY BRIEF**

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*Thomas v. Eastman Kodak, Co.*, 183 F.3d 38 (1<sup>st</sup> Cir.  
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**I. THE FIRST CIRCUIT'S DECISION  
CONFLICTS WITH THIS COURT'S  
DECISION IN O'CONNOR.**

Respondent argues that the First Circuit's decision was not based upon Mr. Webber's alleged failure to establish a prima facie case, but rather upon the failure of his evidence as a whole to demonstrate disability discrimination. This argument is disingenuous. The entire First Circuit opinion evolves from that court's erroneous statement of the prima facie case requirements, which the court held includes the requirement that Mr. Webber demonstrate that the favored employees were not disabled.<sup>1</sup>

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<sup>1</sup>The First Circuit stated:

Webber was required to establish a prima facie case of discrimination, by adducing competent evidence that (1) he was a member of a protected class (viz., "disabled"); (2) he satisfied his employer's legitimate job performance expectations; (3) his employer terminated him; and (4) his employer did not accord similar treatment to persons outside the protected class.

...

Webber maintains that he was not required to establish that the eight engineers retained by IP were not disabled, because, unlike such obvious attributes as race or gender, disability (or lack thereof) is too difficult of proof. He cites no authority for such an exception to the fourth element; nor have we found any. Prima facie proof of coemployees' non-disability may be somewhat more fact-intensive than proof of their race or gender, but the burden is neither unreasonable nor onerous. Webber presumably had ample opportunity to discover this sort of information, and had he proffered even minimally competent testimony that the retained engineers suffered from no such disability, IP would have had the burden to counter Webber's assertions with contrary evidence, if any existed. We can discern no

As set forth in Mr. Webber's petition for a writ of certiorari, this stated requirement of the prima facie case is in conflict with this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308 (1996), as well as being in conflict with case law from other circuit courts of appeal (including many of those cases cited in Respondent's brief) which do not require a showing that favored employees in a reduction in force were outside the protected class.

Respondent next argues that even if the First Circuit's formulation of the prima facie case requirements to include a showing that retained employees were not within the protected class (i.e., disabled), the First Circuit's decision nonetheless cannot conflict with *O'Connor* because *O'Connor* did not involve a reduction in force but rather a single termination. This argument is equally unavailing. If an

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sound reason for excusing a claimant from adducing such straightforward evidence as part of his prima facie case.

*Webber v. International Paper Co.*, 417 F.3d 229, 234 (1<sup>st</sup> Cir. 2005)(citations omitted). The First Circuit further held:

As Webber adduced no evidence from which the jury rationally could have determined whether the retained or terminated employees were disabled, he completely failed to carry his burden of proof on the fourth element of his prima facie case, which required that he demonstrate that IP either retained no employees who were disabled, or terminated other employees who were disabled.

*Id.* at 235. As such, it is readily apparent that the First Circuit's decision was improperly tainted by its belief that Gary Webber was required to prove that the retained employees were non-disabled, which is contrary to *O'Connor*.

employer may not fire a single employee in favor of another within the same protected class, it certainly may not choose an employee for termination in a reduction in force over another within the protected class. In no event may an employer discriminate against an individual on the basis of a protected classification even if it replaces that individual with or retains other employees who are within the same protected class. The First Circuit's heavy reliance upon the lack of evidence that the retained employees were not disabled was simply erroneous and in conflict with the principles espoused in *O'Connor*.

## II. THE FIRST CIRCUIT'S DECISION MISAPPLIES THE STANDARD OF REVIEW MANDATED BY *REEVES*.

As discussed below, the question of what happens in a reduction in force is never limited to what happened to particular employees within an individual's precise job classification. Respondent wishes this Court to focus only on the Engineering Department, and it misrepresents what the actual trial evidence was. Thus, at page 8 of its brief in opposition, Respondent refers to "Oettinger's **uncontradicted** testimony that he had to reduce the 'technical' staff (including engineers) by eight." (emphasis in original). The problem was that Oettinger's testimony was contradicted by IP's own witnesses. The eight "technical" staff that Oettinger claimed were eliminated were not. Three of those technical staff who were scheduled to be eliminated kept their jobs as three older employees took generous early retirement packages. A-460. A fourth, George Reed, was given a retirement date almost two years into the future. A-460. A fifth, Debbie McAllian, was



given a retirement date a year into the future and still works at the mill. A-461, 462. A sixth, Marcia Wood, was given a retirement date a year into the future. A-462. Thus, despite Oettinger's claim that he fired eight technical people on June 25, 2001, only two individuals lost their jobs that **year** and Mr. Webber was the only one ordered off the premises that day. A-145-148.

Two engineers, Jeremy Chubbuck and Steve Morin, were transferred to maintenance in April or May of 2001 in anticipation of the upcoming down-sizing and were not, by virtue of that transfer, down-sized. A-294-295. Mr. Webber had been asking for a similar transfer to the SQA coordinator position, A-118, but was denied that transfer. Mr. Oettinger, at his deposition, claimed that Mr. Webber wasn't given that position because it wasn't vacant at the time of the down-sizing, A-244-247, a claim which was established to be untrue, since the position had been vacant for two months at the time of Mr. Webber's termination, A-120, and the position was not subject to the corporate downsizing, A-245.

Respondent argues that it had no obligation to transfer Mr. Webber into the SQA Coordinator position in its "reduction in force," and that its failure to do so is not evidence of discrimination. While Respondent correctly cites the general rule from *Pages-Cahue v. Iberia Lineas Aereas de Espana*, 82 F.3d 533, 539 (1<sup>st</sup> Cir. 1996), that "an employer is not obligated to offer an employee a transfer or relocation during a reduction in force", the applicability of that rule depends on the facts and circumstances of a particular case. Mr. Webber was not given similar consideration as the other employees referenced above who were either

transferred or given retirement dates well in the future, but was in fact was escorted off the premises that same day without even being permitted to say good-bye to his co-workers or collect his belongings.

Although there is generally no requirement in a reduction in force to transfer a laid-off employee to another position, if the employer does in fact offer transfers (or retirement packages or future termination dates) to some employees, it may not deny the same benefit to employees in a protected class. See, e.g., *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 615 (7<sup>th</sup> Cir. 2000) (in an age discrimination case, holding that when internal job placement services are benefits of employment which are provided to younger employees, an employer must provide roughly the same benefits to ADEA-protected employees, and when an employer responds to a reduction in force by transferring employees to available positions, it may not refuse to transfer older employees based on their age)(citing *Kusak v. Ameritech Info. Sys., Inc.*, 80 F.3d 199, 201 (7<sup>th</sup> Cir. 1996); *Taylor v. Canteen Corp.*, 69 F.3d 773, 780 (7<sup>th</sup> Cir. 1995)). "A claim that an employer refused to provide equal assistance in finding a transfer for a protected employee requires a showing that there was an available position for which the plaintiff was qualified." *Radue*, 219 F.3d at 615 (citing *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 919 (7<sup>th</sup> Cir. 2000); *Taylor*, 69 F.3d at 779-80). See also *Montana v. First Fed. Sav. & Loan Ass'n of Rochester*, 869 F.2d 100, 105 (2<sup>nd</sup> Cir. 1989)(the failure to offer the plaintiff another available position for which she qualified was a relevant factor from which discrimination could be inferred); *Rollins v. Techsouth, Inc.*, 833 F.2d 1525, 1532 (11<sup>th</sup> Cir. 1987)(evidence that the plaintiff was the oldest

employee in the accounting department and was the only one fired, while two younger employees were transferred rather than fired, raised an inference of discrimination); *McGill v. Reynolds Metal Co.*, 169 F.Supp.2d 966, 971 (W.D. Ark. 2001)(same).

In the present case, not only was there evidence of a policy of retaining engineers due to their value to the mill, there was specific evidence of two other engineers who were transferred to different departments in order to avoid terminating them under Functional FAST. Although Mr. Webber had previously applied for the SQA Coordinator position, which was vacant at the time of his termination and was not subject to Functional FAST, IP failed to transfer him to that position. Mr. Webber was clearly qualified for the position of SQA Coordinator, as IP offered him that position three months after his termination, after it had received notice that Mr. Webber had begun legal proceedings. Under these circumstances, IP's **still unexplained** decision not to transfer Mr. Webber to the available SQA Coordinator position rather than terminate his employment is probative evidence of disability discrimination.

It is also irrelevant that Mr. Webber agreed that he was not more qualified<sup>2</sup> than four of the 10 engineers who were retained or transferred while he was terminated. The issue is not whether Mr. Webber was

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<sup>2</sup>Mr. Webber testified only that he was not more qualified than these individuals. Mr. Webber was not asked whether he was less qualified than those individuals, and the jury could have inferred that Mr. Webber was equally qualified as these four people.

more or less qualified than every project engineer who was not terminated, but whether his disability was the motivating factor in his selection for termination. See, e.g., *Rathbun*, 361 F.3d at 74 ("When an employer claims to have hired or promoted one person over another on the basis of qualifications, the question is not which of the aspirants was better qualified, but, rather, whether the employer's stated reasons for selecting one over the other were pretextual.")(citing *Smith v. F. W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996)); see also *Thomas*, 183 F.3d at 58 ("The ultimate question is whether the employee has been treated disparately because of [a protected characteristic]."). IP **never** explained its failure to transfer Webber to the SQA coordinator position. Thus, the fact that Gary Webber admitted that he was not more qualified than four of the 10 engineers who were retained is irrelevant. Moreover, although he did not identify them by their names at trial, he did testify that he was more qualified than the other project engineers who were retained. A-203.

Respondent misrepresents the record when it suggests at footnote 1 of its brief in opposition that "[t]he record does not support Webber's claim that there was a long delay in implementing any of the accommodations International Paper afforded Webber." The first accommodation Mr. Webber requested was a transfer to the SQA coordinator position, since it was a more sedentary job and wouldn't require the constant movement among all three floors of the building which housed the Engineering Department. A-118. This accommodation wasn't afforded to him until after he had been fired and brought a claim of disability discrimination. The second

accommodation he requested, which was never granted, was that there be an elevator installed to service all three floors, A-105. Instead, Mr. Webber was required to use a freight elevator which raised him one of the two floors needed. On the many days that the freight elevator did not work, Mr. Webber would actually have to walk down an embankment from a parking lot, walk across a train trestle, through a machine shop, and then up the last flight of stairs to the Engineering Department. A-99. Even the installation of the "Costanza chair" only saved him 13 of the 30 steps between the second and third floors. A-100. The other accommodations Respondent trumpets were accommodations mandated by Mr. Webber's physician, that his work hours be cut back to four hours a day, four days a week, A-105, and that he be allowed to work at home during his initial recovery period. A-106-107. Undoubtedly, since Webber was being paid salary on a short-term disability, IP preferred to have him do some work, than to simply draw a paycheck while he was recovering. Thus, Respondent's accommodations were grudging, incomplete, and, in the case of the "Costanza chair," accompanied by ridicule from his direct managers. A-109, A-110-111, A-294.

Mr. Webber was the only individual who used the chair glide, A-109, and therefore the only person ridiculed by its nickname of the "George Costanza stairway." Although Mr. Webber had had a handicapped license plate since 1999, A-111, the "George Costanza chair" was not installed until late July of 2000, A-109.

Finally, Respondent, at page 10, misperceives the import of the emphasis that Oettinger and Dr. Read

placed upon the avoidance of work-place injuries. When Dr. Read ordered Mr. Webber off the mill premises in early 2001, A-396, he was concerned only about Mr. Webber getting injured on **mill** premises, not being injured at home. Similarly, the mill, under Oettinger's direction, had been rewarded for having gone so long without workplace injuries. The fear of the disabled as being injury-prone, although benign, is as archaic as the fear that women, as the weaker sex, cannot handle a construction job, or that blacks in the Pittsburgh steel mills were better suited for work in front of the blast furnace than at other less hot and more remunerative positions. Factoring an individual's disability, gender, or race into the decision-making process is illegal whether the belief is benign or malignant.

### CONCLUSION

For the foregoing reasons, this Court should grant Mr. Webber's petition for a writ of certiorari because the First Circuit's decision conflicts with two Supreme Court cases, *Reeves* and *O'Connor*.

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